Central Law Journal.

ST. LOUIS, MO., APRIL 7, 1899.

Promoters and organizers of corporations will find in the recent case of First National Bank v. F. C. Trebein Co., decided by the Supreme Court of Ohio, a salutary lesson regarding the reckless formation of corporations by irresponsible persons, who, under the guise of corporate functions, undertake to transact business, which as individuals they would not be able to do. There it appeared that a failing debtor formed a corporation, composed of himself and certain members of his family, he taking substantially all the stock, and at once conveyed all his property to the corporation in exchange for the stock by him taken, and for no other consideration; and immediately placed all his stock, except one share, with certain of his creditors, who had knowledge of the facts, as collateral security to their claims; and, as president and general manager, retained control of the property, and managed it for his own use and benefit. The court held that such a conveyance is a fraud on his other creditors, and may be set aside by a court at their suit, and the property administered for the benefit of all his creditors under the insolvent laws of the State. The court very clearly states the legal propositions applicable to such a state of facts. In contemplation of law, a corporation is a legal entity, an ideal person, separate from the real persons who compose it. This fiction, however, is limited to the uses and purposes for which it was adopted,—convenience in the transaction of business and in suing and being sued in its corporate name, and the continuance of its rights and liabilities, unaffected by changes in its corporate members. But the fiction cannot be abused. A corporation cannot be formed for the purpose of accomplishing a fraud or other illegal act under the disguise of the fiction; and, when this is made to appear, the fiction will be disregarded by the courts, and the acts of the real parties dealt with, as though no such corporation had been formed, on the ground that fraud vitiates everything into which it enters, including the most solemn acts of men. The good faith of the parties to such a transaction must be determined by its legal effect on the rights of others. If its legal effect works a fraud on their rights, the finding of a court that the parties acted in good faith is simply an erroneous conclusion of law from the facts. The fiction by which an ideal legal entity is attributed to a duly-formed incorporated company, existing separate and apart from the individuals composing it, is of such general utility and application as frequently to induce the belief that it must be universal, and be in all cases adhered to, although the greatest frauds may thereby be perpetrated under the fiction as a shield. But modern cases, sustained by the best text writers, confine the fiction to the purposes for which it was adopted—convenience in the transaction of business and in suing and being sued in its corporate name, and the continuance of its rights and liabilities, unaffected by changes in its corporate members—and have repudiated it in all cases where it has been insisted on as a protection to fraud or any other illegal transaction. Thus, in Brundred v. Rice, 49 Ohio St. 640, 32 N. E. Rep. 169, where an incorporation had been formed for the purpose of giving effect to an illegal agreement between it and a railroad company for a discrimination in freights between it and other shippers, the fiction was disregarded, and a recovery allowed against the promoters by one who had been thus discriminated against, in like manner as if the corporation had no existence. See also Railway Co. v. Miller (Mich.), 51 N. W. Rep. 981; Gas Co. v. West, 50 Iowa, 16; Booth v. Bunce, 33 N. Y. 139; State v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. Rep. 279. A like attempt has frequently been made of late to use this fiction in connection with a conveyance to the legal entity, as a means of defrauding creditors, but seems to have uniformly failed. See Web Co. v. Dienelt, 133 Pa. St. 585; Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co., 13 Fed. Rep. 513; Bennett v. Minott, 28 Oreg. 339, 44 Pac. Rep. 288; Terhune v. Bank, 45 N. J. Eq. 344; Kellogg v. Bank, 58 Kan. 43, 48 Pac. Rep. 587. In the Kansas case last mentioned it was held that a fraud may be perpetrated by an insolvent merchant, through the instrumentality of a corporation organized and controlled by himself, to which he transfers the bulk of his property, as well as by a transfer to an individual.

NOTES OF IMPORTANT DECISIONS.

ESTOPPEL — FORGERY OF SIGNATURE OF SURETY ON NOTE.—The Appellate Court of Indiana, decides in Kuriger v. Joest, 52 N. E. Rep. 764, that defendant is estopped from claiming that his signature as surety on a note given plaintiff was a forgery, where, before the note was due, and while the maker was solvent, plaintiff, not knowing of the forgery, took it to defendant, to see if he would buy it, and he, after examining it, though knowing his signature was not genuine, made no claim of forgery, but arranged for a subsequent meeting to negotiate for taking up or purchasing it, and plaintiff by reason thereof delayed action on the note till after the death and insolvency of the maker. The court says in part: "Appellee insists that the case of Henry v. Heeb, 114 Ind. 275, 16 N. E. Rep. 606, is an authority in this case, and must control. We have examined that case with much care, and find that the decision rested upon facts materially different from those in the case at bar, and therefore is clearly distinguishable from it. In that case it was sought to invoke the doctrine of ratification of a forged signature, and the court said 'that the distinction made in many well-considered cases seems to be this: Where the act of signing constitutes the crime of forgery, while the person whose name has been forged may be estopped by his admissions, upon which others may have changed their relations, from pleading the truth of the matter to their detriment, the act from which the crime springs cannot, upon considerations of public policy, be ratified without a new consideration to support it.' And continuing, it was further said: 'In the case of a known or conceded forgery, we are unable to discover any principle upon which a subsequent promise by the person whose name was forged can be held binding, in absence of an estoppel *in pais*, or without a new consideration for the promise.' Appellant does not contend that the facts pleaded show a ratification, but that what appellee did and said about the note estops him from now pleading *non est factum*. We cannot understand why one who sees and knows that his name has been forged to a note may not by his conduct be estopped from pleading forgery. It is settled by many well-considered cases that while a person whose name has been forged may be estopped by his admissions, upon which others may have changed their relations, from pleading the truth of the matter to their detriment, the act from which the crime springs cannot, upon considerations of public policy, be ratified without a new consideration to support it. Henry v. Heeb, 114 Ind. 275, 16 N. E. Rep. 606; Lewis v. Hodapp, 14 Ind. App. 112, 42 N. E. Rep. 649; Shisler v. Vandike, 92 Pa. St. 447; McHugh v. Schuylkill Co., 67 Pa. St. 391; Workman v. Wright, 33 Ohio St. 405; Owsley v. Phillips, 78 Ky. 517; 2 Rand. Com. Paper, § 629. These cases firmly establish the doctrine that a person, by admissions, may be estopped from pleading forgery; and, by analogy, it is plain that he may also be estopped by conduct, where such conduct leads another to act to his detriment. Appellant undoubtedly, under the facts, suffered a change in his relations, by refraining from steps which otherwise might, and probably would, have secured him in his rights as against the maker of the note. As to what is required to constitute a change of relations, may be easily determined from authorities. Thus, in Purviance v. Jones, 120 Ind. 162, 21 N. E. Rep. 1099, it was held that where one is induced to forego his purpose to secure his money before the statute of limitations has barred his claim, by the assurance of the debtor that a note has been signed and delivered to a bank for his benefit, he may, upon the death of the debtor with the note still in his possession, be entitled to compel a delivery, or require it to be treated in an equitable suit as having been delivered as represented. In discussing the question, Mitchell, J., on page 165, 120 Ind., and page 1100, 21 N. E. Rep. said: 'It may be that the evidence was such as to have justified a finding that the note had been delivered to the bank for the plaintiff's benefit, but the fact was not so found. The intestate, having received the plaintiff's money, may have induced him to forego any effort to enforce collection, upon the assurance that a note had been left with the bank for the amount of the debt for his benefit. If the plaintiff rested upon that assurance until the statute of limitations had barred the debt, the estate may not be estopped to say that the note was not delivered, as against one who relied upon the statement, and who would now suffer actual pecuniary loss if the note actually signed was not treated as having been delivered according to the representations made and relied upon.' In Bank v. Morgan, 117 U. S. 96, 6 Sup. Ct. Rep. 657, appellees were depositors in appellant bank. They sent their passbook to be written up and balanced, and, when this was done, it was returned to them, with the debits and credits and their paid and canceled checks. Some of the checks, which had been duly signed, had been raised by a clerk in their employ before presented for payment. Appellee did not make any examination of the paid checks and the passbook to see if any error had been made, and an action was brought against the bank to recover the balance in favor of appellees predicated upon the amount of the checks as originally issued. The court, by Mr. Justice Harlan, said: 'Still further, if the depositor was guilty of negligence in not discovering and giving notice of the fraud of his clerk, then the bank was thereby prejudiced, because it was prevented from taking steps, by the arrest of the criminal, or by an attachment of his property, or other form of proceeding, to compel restitution. It is not necessary that it should be made to appear by evidence that the benefit would certainly have accrued to the bank from an attempt to secure payment from the criminal. Whether the depositor is to be held as having ratified what his clerk did, or to have

adopted the check paid by the bank and charged to him, cannot be made, in this action, to depend upon a calculation whether the criminal had at the time the forgeries were committed, or subsequently, property sufficient to meet the demands of the bank. An inquiry as to damages in money actually sustained by the bank by reason of the neglect of the depositor to give notice of the forgeries might be proper, if this were an action by it to recover damages for a violation of his duty. But it is a suit by the depositor, in effect, to falsify a stated account, to the injury of the bank, whose defense is that the depositor has by his conduct ratified or adopted the payment of the altered checks, and thereby induced it to forbear taking steps for its protection against the person committing the forgeries. As the right to seek and compel restoration and payment from the person committing the forgeries was, in itself, a valuable one, it is sufficient if it appears that the bank, by reason of the negligence of the depositor, was prevented from promptly, and, it may be, effectually, exercising it.' The Supreme Court of Texas has stated the rule as follows: 'It has been held by this court that, when one party has been prevented or induced by the conduct and representations of another from taking prompt action for the collection of his debt, this is such a change in his position, for the worse, as to meet the requirement of the law in order to create an estoppel;' citing, as authority, Schwarz v. Bank, 67 Tex. 217, 2 S. W. Rep. 865. 2 Herm. Estop. p. 906, says: 'It is not necessary that a party should act affirmatively upon a declaration, to create an estoppel. If he had acted, not in reliance upon it, but has means in his power to retrieve his position, and, relying upon the statement in consequence of it, he refrained from using those means, the estoppel will be enforced for his benefit.' In Bank v. Keene, 53 Me. 103, arrest is named as one of the means of obtaining security which the plaintiff had not availed himself of, by the conduct and declaration of his adversary. In Knights v. Wiffen, 5 Q. B. 660, it was held that it need not appear that any benefit would result from the attempt to secure payment, but that the injured party had the right to make the attempt, and, losing the exercise of the right by his reliance upon the declaration, the declarant was estopped. In Continental Nat. Bank v. National Bank of the Commonwealth, 50 N. Y. 585, the plaintiff held a note purporting to have been forged. Upon hearing that the same was forged, plaintiff asked defendant about it, and, after looking at the note, admitted the signature to be genuine. The plaintiff relied upon such statement, and refrained from taking any steps against the person who passed the forged instrument, to secure payment from him. The trial court instructed the jury that if the plaintiff relied upon the defendant's admission that the note was genuine, and was thereby induced to refrain from obtaining security by the arrest of the one passing the note, or by attachment of his property, and thereby sustained an injury, the defendant would be estopped from denying his signature. This instruction was held to correctly state the law, and, in the course of the opinion, Folger, J., said: 'These cases appear to us to lay down a sound rule. It must be that the conduct of men, which may be influenced by the declarations of those with whom they deal, is not confined to that which is shown by affirmative and positive acts following upon and induced by those declarations. Conduct is not alone that which is active, positive, and affirmative. Conduct, as limited to this inquiry, is the reserve of one's own powers of person and property, and of those means of help which can be summoned from friendly or accommodating sources and from the tribunals of justice, and is as often forbearance of their use, and quiescence and contentment with the affairs as they are, as action designed to change affairs. And such quiescence and consent, induced by false or erroneous statement, may be quite as damaging as any result from action. It is as bad to fail to recover property gone, when, with the knowledge of the existing fact, it might have been retrieved, as it is to lose it. And so it is as damaging to rely in quiet upon an untrue statement, to the neglect of using the means of recovery, as it is to rely upon an untrue statement, and by action thereon meet with loss irreparable. To hold otherwise would be to assert that the law makes a difference between damage received by action, and omission to act in circumstances precisely similar, save in these elements.'

"By the conduct and representations of the appellee, he either adopted the signature, knowing it to be a forgery, or by his silence and concealment induced appellant to rely and act upon it; and in either event he should not, in good conscience, be permitted to say that he is not bound, under the facts pleaded, to respond to appellant for any injury he has sustained. In other words, he is estopped from setting up the defense of forgery. As was said in Bank v. Keene, *supra:* 'If the jury found that the defendant adopted the signature, knowing it to be a forgery, his liability for the whole amount of the note is not denied. And the result would have been the same if they found that he was estopped from denying the signature. There are some cases in which one may be liable only for damages caused by his representations. But the general rule applicable to estoppels *in pais* is not that one may deny the truth of representations made by himself, upon which another has been induced to rely, and pay the damages caused thereby, but that he shall not be permitted to deny their truth.' In the Massachusetts case (Bank v. Buffington, 97 Mass. 498), the court said: 'The injury which, permitting him to deny the truth of his representation, would occasion to the plaintiffs is the loss of a good and valid indorser upon the notes, which, so far as he is concerned, is the liability for their full amount. If the action were for deceit in making false representations, the rule of damages would be found

by ascertaining, as the defendant asks should be done in this case, in how much worse condition the plaintiffs had been put by reason of the deceit. But the plaintiffs are not in that position. They had some notes of doubtful value. They do not ask to be compensated for having discovered this fact a few days later than they might have done, if they had not trusted to the defendant's statement, which perhaps occasioned them little injury; but they say, and the finding of the jury entitles them to say, that in consideration of their trusting the defendant's assurances, by his procurement, and thereby exposing themselves to the injury which such delay might occasion, which is a sufficient consideration in law, the defendant made himself liable to them as indorser. The injury in the case at bar which would result to the plaintiffs from allowing the defendant's admission that he was indorser to be disproved would be the loss of his security as indorser, and the estoppel is to be co-extensive with the injury.' In the case of Forsyth v. Day, 46 Me. 176, it was held that if a forged note is presented to the alleged maker, and he deceives the holder by language and acts calculated to induce reasonable belief that the note was genuine, he will be estopped from denying his signature, if the holder, acting upon the belief, has been injured. This case is parallel in all of its essential features to the one before us. Here appellee was shown the note, with what purported to be his own signature. He examined it. He told the holder that he did not have ready money at that time to take up the note, and that he would see him again in a short time, and fixed the place and time of the meeting. He again saw the note, and agreed to see Weber, and see what could be done. He must have known that his signature to the note was forged, and yet he concealed the fact of the forgery, to the injury of appellant, in that he was lulled into silence and inaction, and did not take the steps necessary to preserve his rights and secure the payment of the money which he had loaned Weber, and which the averments of the complaint say he could and would have done. And, in line with the doctrine last announced, it was held in Merrill v. Tyler, Seld. Notes, 83, that language of a person whose name had been forged to a note, which induced a holder to advance more money upon it, estops the party purporting to be the maker from denying his signature, in so far as it concerns the money advanced on the faith and reliance of his word. There is a long line of cases holding that mere silence of the person whose name has been forged, when the instrument purporting to bear his signature is shown him, will not work an estoppel, unless the holder has been damaged thereby. Corser v. Paul, 41 N. H. 24; Salem Bank v. Gloucester Bank, 17 Mass. 1; Bank v. Wentzel, 151 Pa. St. 142, 24 Atl. Rep. 1087; McKenzie v. Linen Co., 6 App. Cas. 82. But we have not been cited to any case, and we have been unable to find any, holding that the silence of one whose name has been forged, with a knowledge of the fact, where the holder has relied and acted upon such silence, to his injury, in the belief that the signature was genuine, would release him from liability. The doctrine of estoppel will apply when the party sought to be estopped has stood by and remained silent when it was his duty to speak. This is one of the essential elements of estoppel. Thus, in Anderson v. Hubble, 93 Ind. 580, the court said: 'The term "standing by," so often used in the books and reports in discussing cases of estoppel, does not mean actual presence or actual participation in the transaction, but it means a silence when there is knowledge, and a duty to make a disclosure.' It has been held that silence, when it is the duty of the party to speak, is equivalent to concealment. Studdard v. Lemmond, 48 Ga. 100; Cady v. Owen, 34 Vt. 598; Manufacturing Co. v. Kimmel, 87 Ind. 560; Wheeler v. Railroad Co., 115 U. S. 29, 5 Sup. Ct. Rep. 1061, 1160; Jeneson v. Jeneson, 66 Ill. 259; Griffin v. Nichols, 51 Mich. 575, 17 N. W. Rep. 63. And in Gatling v. Rodman, 6 Ind. 289, it was held that the term 'standing by' does not mean or import an actual presence, but implies knowledge under such circumstances as to render it the duty of the possessor of the particular knowledge to communicate. See also State v. Holloway, 8 Blackf. 45; Ellis v. Diddy, 1 Ind. 561. In Richardson v. Chickering, 41 N. H. 380, the meaning of the phrase 'standing by,' as defined in Gatling v. Rodman, *supra*, is expressly approved, and favorably commented upon. Herman on Estoppel, vol. 2, p. 1131, § 1007, lays down the following rule: 'Where a party sees an obligation, with his name signed to it without his authority and consent, yet tells the obligee that the signature is his, he is bound by it, and will be estopped to say that it is not his act and deed. Reason and policy of law forbid that a party who is apparently an obligor should assert that he is such, and bound by his obligation, and afterwards escape the debt by plea of *non est factum*.' While appellee did not, when the note was shown to him, and he saw his name upon it, tell appellant that the signature was his, he did not deny it, but his representations and conduct led appellant to believe that it was his genuine signature, and there is no question but what he relied and acted upon it."

OF THE SATISFACTION OF JUDGMENTS BY ONE JOINTLY LIABLE THEREUNDER.

In order to properly understand the subject, it will not be amiss to advert at the outset to a few elementary principles involved in the same. In the case of a joint judgment those liable are each liable for the whole debt, and as to their liability they are all considered as together constituting one person—the

act of one being the act of all. And in cases of joint liability, in general, where a release is given to one, the others are also discharged. Again, if one of them pay the whole debt he has an undoubted right to contribution from the others not so paying, to the extent of their liability to him. That judgments may be assigned is also well settled, but distinguishing between assignments and absolute payments is often very difficult. The rule is obvious that when the terms of a judgment or decree are complied with by those whose duty it is to comply, such a judgment becomes absolutely void, and cannot, by any act of the judgment creditor, be kept alive. Therefore, in the case of a single judgment debtor having paid the judgment and taken an assignment of the same, such assignment is void;[1] and should he, by virtue of the *prima facie* assignment, attempt to convey or transfer the judgment to another, the transfer conveys no title. In such cases the judgment debtor becomes the holder of the judgment, he has consequently complied with its terms, from further performance he is absolved, and as far as future purposes are concerned, as said before, the judgment is dead. Sometimes a stranger may satisfy a judgment, although he contemplated a purchase thereof, if such intent was unknown to the holder, and in the absence of any agreement.[2] It is purely a question of intention in every case as to whether the act of the said stranger is a payment in discharge or a purchase.[3] As where a judgment creditor, by an assignment, transfers the judgment to a stranger thereto, in the absence of proof of contrary intention, it will be presumed that he purchased the judgment, but where no assignment was mentioned, intended or given, the rule to the contrary obtains, and upon payment the judgment is discharged, and the stranger must seek for independent relief against the person for whose benefit he paid the same.[4] An assignment to a stranger has been held to be conclusive proof of a transfer,[5] but as said before, the intention of the parties governs largely.[6] Where a judgment debtor, in connection with a stranger, pay a judgment, and an assignment is made to the stranger, such assignment is void as respects the debtor, but valid to the extent of the stranger's interest.[7] In a Kentucky case,[8] it was said: "Undoubtedly, the absolute payment of a debt, without any agreement or understanding that it is to continue in force for some purpose, or the benefit of some one, terminates its existence. It cannot be revived by any subsequent agreement, nor again be forced into life to secure a new debt or some other engagement," and that defendant, twenty-four days after payment of judgment, in pursuance of an agreement made at the time of, or previous to, such payment, that defendant should hold the judgment as security for his benefit, took an assignment of said judgment, it was held that the judgment was not extinguished by such payment. But in a Michigan case,[9] where a judgment debtor's attorney paid a judgment against his client, agreeing with plaintiff's attorney that if the former's client refused to reimburse him, such payment was to be refunded, and the satisfaction of the judgment withdrawn. Plaintiff had no knowledge of the agreement, and did not know by whom the payment was made, but supposed the judgment had been satisfied by the debtor, as he had a right to do; the attorney of debtor failed to obtain an assignment of the judgment to protect himself, it was held that the judgment was satisfied, and that the attorney of the debtor must seek for relief directly from his client. We will now consider the effect of payment by one jointly or jointly and severally liable. The prevailing authority is that such payment effects a satisfaction of the judgment. In all reason it seems that it should be so, for where the judgment creditor has received his money, and from those, or any of those, who were liable to pay, the judgment is satisfied.[10] It may be said to be a harsh rule and founded upon the doctrine relative to the discharge of joint obligations at common law, but the fol-

[1] Bank v. Kemble, 1 Mo. App. Rep. 341.
[2] Sandford v. McLean, 3 Paige Ch. 117, 23 Am. Dec. 773; Head v. Gervais, Walker, 577, 12 Am. Dec. 577.
[3] Null v. Moore, 10 Ired. 324.
[4] Harbeck v. Vanderbilt, 20 N. Y. 395; Null v. Moore, 10 Ired. 324; Marshall v. Moore, 36 Ill. 321; Rollins v. Thompson, 21 Miss. 522; Sydam v. Cannon, 1 Houst. (Dela.) 431.
[5] Harbeck v. Vanderbilt, 20 N. Y. 395.
[6] Campbell's Appeal, 29 Pa. St. 401.
[7] Harbeck v. Vanderbilt, 20 N. Y. 395; Winslow v. Leland, 128 Ill. 304, 28 N. E. Rep. 588. See also Bender v. Matney, 122 Mo. 244, 26 S. W. Rep. 950.
[8] Roberts v. Bruce, 15 S. W. Rep. 872.
[9] Rogers v. Welte, 61 Mich. 258, 28 N. W. Rep. 86.
[10] Hogan v. Reynolds, 21 Ala. 56, 56 Am. Dec. 236; Bartlett v. McRae, 4 Ala. 688.

lowing observations would tend to place the decisions in almost accord. In a suit by one against two or more upon a joint undertaking or tort, the only triable issues that are relevant are those raised by the pleadings between such creditor or injured party and the defendants. The plaintiff has no concern as to the rights and obligations of the defendants between themselves. The question is, are they jointly liable to him, not what is the extent of their liability to each other by private agreement; a different rule would create a multiplicity of issues always condemnable. The plaintiff has a right to recover the amount of his judgment against each and every defendant as a whole. Judgments rarely fix the rights and liabilities of the defendants between themselves. Hence, if one joint judgment debtor pays a judgment and is allowed to take an assignment thereof, he would have too much power in his hands to wield against his co-defendants. He would hold a judgment available against such co-defendant without any adjudication as to their mutual rights and liabilities, which seems absurd. It would be anything but a safe principle to permit a paying defendant to do this. Resorting to an execution against his co-defendants would be a summary proceeding not tolerated by law. For instance, suppose a surety or indorser pay a judgment which is silent as to his liabilities between himself and the principal debtor. If he were entitled to an execution to reimburse himself for the amount paid by him, where and by whom could the extent of his reimbursement be determined? Were he so entitled to an execution, why on the same principle could not one primarily liable, paying the judgment silent as to the relations of the various co-defendants, enforce the judgment against a mere surety? The law presumes them to be joint debtors in the absence of any contrary proof. It is evident another suit must be brought to determine their mutual rights. In general, the law of subrogation applies, but how can it where the extent of the right is not known?[11] Where partners were joint defendants, and one of them paid the judgment and took an assignment thereof, it was held to be a satisfaction, and the court said that the amount the party paying was entitled to "as against the others necessarily depends upon the state of the partnership account." The doctrine was announced in the case of Sherwood v. Collier[12] as follows: "A payment by any one of two or more, jointly or jointly and severally bound for the same debt, is payment by all. * * * It is true, that if a payment be not intended, but a purchase, there is a difference. But that can only be by a stranger, or by using the name of a stranger, to whom an assignment can be made when there is but a single security, and that one upon which all the parties are jointly liable. This is upon the score of intention, and because the plea of payment by a stranger is bad upon demurrer. If the assignment of a joint security be taken by the surety himself, there is an extinguishment, notwithstanding the intention, because an assignment to one of his own debt is an absurdity. * * * In the case of separate judgments, nothing but a plain intention, evinced by an assignment to keep up the judgment, can have that effect." But where the assignment is made to a stranger, *prima facie* the judgment will be kept alive.[13] Where a judgment was rendered against a principal and his surety jointly, and the surety having paid the plaintiff, he took an assignment thereof. It was held that the judgment, at the time of its assignment, was dead, and the surety acquired no legal or equitable rights as assignee,[14] and it was likewise held where a judgment was rendered against a principal and indorser of a note jointly, no defense of indorsement or suretyship having been made by the indorser,[15] and the judgment will be considered joint and the parties primarily liable, unless the party secondarily liable has been judicially determined to be merely a surety.[16] There are many other authorities which hold that a payment by a joint judgment debtor satisfies the judgment, notwithstanding the assignment of the judgment to the paying party.[17]

[11] Booth v. F. & M. N. Bank, 74 N. Y. 230.

[12] 3 Dever. Law, 380, 24 Am. Dec. 264.

[13] Hodges v. Armstrong, 3 Dever. Law, 253; Brown v. Long, 1 Ired. Eq. 190; Lyon v. Bolling, 9 Ala. 463, 44 Am. Dec. 444; Null v. Moore, 10 Ired. 324; Hayes v. Ward, 4 Johns. Ch. 123, 8 Am. Dec. 554; Dempsey v. Bush, 18 Ohio St. 376; Cottrell's Appeal, 20 Pa. St. 294; Peters v. McWilliams, 36 Ohio St. 155; Barrington v. Boyden, 7 Jones, 187.

[14] Fulton v. Harrington (Dela.), 30 Atl. Rep. 856; Bank of Salina v. Abbott, 3 Denio, 181.

[15] Potvin v. Meyers (Neb.), 44 N. W. Rep. 25.

[16] Laval v. Rowley, 17 Ind. 36.

[17] Montgomery v. Vicory, 110 Ind. 211, 11 N. E. Rep. 38; Mathews v. Lawrence, 1 Denio, 212; Bank of Salina

In a Massachusetts case,[18] the court said: "The judgment creditor had received all his money he could not afterwards have legally caused the execution to be levied; nor could he have authorized the party who paid the judgment, he being a party to it (and a joint judgment debtor), and obliged to pay it. The judgment was satisfied by this payment, and if a suit had been brought upon it, the receipt given by Ames (the creditor) would have been perfect evidence of payment. * * * The only way attempted to get rid of this difficulty was, to consider the payment of the money by the joint judgment debtor, as no payment with respect to one moiety of the debt which it supposed" the other joint judgment debtor "ought to have paid." * * * "But there is no room for such distinction; one of the judgment debtors paid the whole execution (judgment) and this gave him a right of action against his fellow debtor, but did not keep alive the execution for his benefit." Where A and B, partners, executed articles of dissolution, whereby A was to be absolved from payment of debts, but B failed to pay them, and A and B were sued jointly and judgment rendered. A paid the judgment and the court thereon said: "If A be but surety be may, perhaps, on making a proper case, be entitled in equity to be subrogated to the rights of the judgment plaintiffs. But in law the judgment is extinguished and no execution can issue thereon, as such, though A might have an action at law to recover the money paid, based upon B's agreement" with him.[19] We have shown where judgments have been held satisfied, and will now comment upon cases to the contrary. In an English case,[20] it was held that one of several partners owing a judgment may buy it up, have it assigned to a stranger and collect it in his name, and Baron Parks said, "If the debt be kept alive at the time, it cannot be satisfied by the very act which keeps it alive. To construe that as a payment which is meant to be an assignment is a contradiction of terms." The questions arise: How much shall the paying debtor collect from the others? When are the mutual liabilities of the parties to be determined? If the partner paying sues out an execution against his co-partner, what remedy has the co-partner against a wrongful use of it? He must necessarily resort to equity. But were the party discharging judgment compelled to seek relief at law in an action for contribution an equitable proceeding would be avoided. He has the equitable right of subrogation, but such right is not to be used as a sword but as a shield. This case is relied upon in the New Jersey Court of Errors[21] which overruled the supreme court in the same case,[22] where it is held that unless a satisfaction was intended, payment by one of several defendants of the judgment, and taking an assignment thereof, will be presumed to be a purchase. In that case, however, the assignment was taken in the name of a third person. We are confronted with the same questions observed previously. Although a transfer to a stranger may *prima facie* create an assignment, yet it would seem to be a mere subterfuge to evade the common law rule. The supreme court held that the remedy of the paying defendant was by an action for money paid, and this we think was correct?[23] In a later case in New Jersey,[24] where a party paying judgment against himself and maker was an indorser, he moved the court to have control of the same against the party principally liable. The latter contended that he was not indebted to the indorser. The statute of that State in effect declared that if judgment be paid by one secondarily liable, he shall have the benefit of the judgment obtained by the plaintiff so as to avoid the expense and the delay of a new action against the other defendant, and further that he have execution thereunder to compel repayment, and in cases of controversy between such parties the question may be tried on issue formed for that purpose. Held, in accordance with the stat-

v. Abbott, 3 Denio, 181; Ontario Bank v. Walker, 1 Hill, 652; Morley v. Stevens, 47 How. Pr. 228; Porter v. Gill, 44 Vt. 520; Cross v. Pa., etc. Ry. Co., 65 Hun, 191, 20 N. Y. Supp. 28; Sager v. May, 15 R. I. 528; Tompkins v. Fifth Nat. Bank, 53 Ill. 57; Weston v. Clark, 37 Mo. 568; Bones v. Aiken, 35 Iowa, 534; Ft. Worth Bank v. Daugherty, 81 Tex. 301, 16 S. W. Rep. 1028; Smith v. Lang, 2 Tex. Civ. App. 683, 22 S. W. Rep. 197; Harbeck v. Vanderbilt, 20 N. Y. 395; Ellis v. Betzer, 2 Ohio, 89; Ayer v. Ashmead, 31 Conn. 449; Presslar v. Stallworth, 37 Ala. 405; Turner v. Hitchcock, 20 Iowa, 310; Towe v. Felton, 7 Jones, 216; Hinton v. Edenheimer, 4 Jones Eq. 406.

[18] Hammatt v. Wyman, 9 Mass. 138.

[19] Bones v. Aiken, 35 Iowa, 534.

[20] McIntire v. Miller, 13 M. & W. 728.

[21] Brown v. White, 5 Dutch. 514.

[22] White v. Brown, 5 Dutch. 307.

[23] White v. Brown, 5 Dutch. 307.

[24] Durand v. Trusdell, 44 N. J. Law, 597.

ute, that party paying have control of judgment subject to a determination of the other co-defendant's liability to him. The statute evidently attempted to supply the inability of the party paying to use the judgment, but the legislature was confronted with the obstacle that a determination of the parties' rights *inter sese* was sometimes necessary even where one secondarily liable pays a judgment. The statute provides for such a necessity, and its provisions amount to nothing more than the common law remedy—an action for money had and received. Where a judgment was rendered against each of several debtors to the extent of the unpaid shares of stock, in their hands, satisfaction by one of an entire judgment was not a discharge of all co-defendants.[25] Such a judgment, however, could scarcely be termed joint but several, so this case does not support the contrary doctrine. In Wheeler's case,[26] the chancellor said: "Where the judgment stands open, I cannot see why a co-defendant paying more than his due proportion may not avail himself of the judgment for his indemnity." On principle there is no reason, but as before, when, wherein, and by whom is his "due proportion" ascertained? The chancellor had in mind the relative positions of the co-defendants as between themselves or he would not have made the above assertion. In another case,[27] though scarcely in point, it was held that a defendant who had paid more than his proportion of a decree was entitled to stand in the place of the plaintiff and to use the decree for his protection and indemnity so far as it appeared that the co-defendants ought to contribute. This is likewise correct as in Wheeler's case, and the same observations apply. Based upon the last two cases stands a California case[28] where a judgment as paid by one defendant G, and an assignment taken in the name of a stranger. Afterwards G sued out an execution against the co-defendant C, who in this proceeding sought to enjoin its collection. G pleaded in the injunction suit that the judgment against them was on account of money borrowed by both but applied to C's own use, and that C ought to pay off the entire judgment. The court said: "It would be unjust to allow the judgment to be enforced for a greater sum than that legally chargeable to him as his proportion of the debt, but to that extent no injustice can result from its enforcement, and we see no reason why it may not be used by G for his protection and benefit. The plaintiff (C) and G were jointly liable upon the judgment, and, of course, as between themselves, they were severally liable for their respective proportions of the amount necessary to discharge it. G paid the whole of this amount, and we think he is entitled to be subrogated to the rights of T (the judgment creditor) to the extent of the amount paid by him for the benefit of plaintiff (C)." And the court then cites Wheeler's case and Scribner v. Hickok, *supra*.[29]

In conclusion, wherever the extent of the rights of joint defendants between themselves are not determined in the judgment rendered against them jointly as said before, it would be a very dangerous and unsalutary rule to allow the party paying to hold the judgment in force against his co-debtor. There is no question that such proceeding would be a summary one, and contrary to due process of law; and those jurisdictions which hold such judgments may be assigned to, and kept alive for, the benefit of the paying party, are bound to hold the execution of the judgment in suspension wherever a contest arises until the extent of the co-debtor's liabilities are ascertained, and such must be obtained in another suit. The contrary doctrine would seem rather to be futile, and the possessor of the judgment would not

[25] Molyneaux v. Marsh, 1 Woods, 452.
[26] 1 Md. Ch. 80.
[27] Scribner v. Hickok, 4 Johns. Ch. 532.
[28] Coffee v. Tevis, 17 Cal. 239.

[29] See also Huckaby v. Sasser, 69 Ga. 603. See Corey v. White, 3 Barb. 12, where judgment was purchased by indorser. Where separate judgments are recovered for joint tort or obligation, payment of one judgment by the defendant will satisfy the other judgments, and an assignment will not keep the others alive. See Shainwald v. Lewis, 46 Fed. Rep. 839; Ashcraft v. Knoblock (Ind. Sup.), 45 N. E. Rep. 69; Bryant v. Reed (Neb.), 52 N. W. Rep. 694; Craft v. Merrill, 14 N. Y. 456; Sherman v. Brett, 7 Wis. 139; First Nat. Bk. v. Ind., etc., 45 Ind. 5. But where the costs only as to one separate suit are satisfied, the other judgments were not satisfied. Bell v. Perry, 43 Iowa, 368. Where payment is made by one jointly or jointly and severally liable for an original undertaking upon which judgment has not been rendered, satisfaction of the same has been held in the following cases, notwithstanding an assignment had been taken. Baker v. Secor, 7 N. Y. Supp. 548; Cleiman v. Murphy, 34 Ill. App. 633; Flagg v. Kirk, 20 D. C. 335. *Contra:* Murray v. Meade, 5 Wash. St. (under a statute) 693, 32 Pac. Rep. 780; Des Moines Sav. Bk. v. Colfax Hotel Co. (Iowa), 44 N. W. Rep. 718.

be in a better position than if he had no judgment, but only a mere claim for contribution. To say that a joint debtor may purchase a judgment is to place in his hands dangerous power which ought not to be permitted without an adjudication. If the defendant's respective rights were adjudicated in the original proceedings, then we can say that the other parties are liable so far as it appears that they ought to contribute. Considered in the light of reason and authority, it would seem to be the better rule to regard the judgment as satisfied when paid by one jointly liable thereunder.

WACO, TEXAS. SAMUEL H. CLAYTON.

CRIMINAL LAW — INDICTMENT — SUFFICIENCY.

HARDIN v. STATE.

Supreme Court of Georgia, February 2, 1899.

The Penal Code is mandatory in its provisions prescribing the form of every indictment or accusation of a grand jury. An indictment, therefore, from which there have been entirely omitted the words prescribed in the form, "contrary to the laws of said State, the good order, peace and dignity thereof," is defective; and a special demurrer thereto by the accused, made, on account of such defect, before trial, should be sustained, and the indictment quashed.

LEWIS, J.: This case came on for trial in the county court of Putnam county on an indictment found by the grand jury of that county, charging the accused with unlawfully selling spirituous liquors. There was an entire omission from the indictment of the following words embodied in the form prescribed by the statute for such instruments, namely, "contrary to the laws of said State, the good order, peace and dignity thereof." Before arraignment and plea, the accused demurred to the indictment "because the same does not follow the form prescribed by the statute, and does not allege that the acts therein charged were 'contrary to the laws of said State, the good order, peace and dignity thereof,' as required by the statute, and hence is fatally defective and void." The judge of the county court overruled the demurrer, whereupon the accused petitioned the superior court, praying for a writ of *certiorari*, alleging error in the judgment of the court overruling his demurrer. The judge of the superior court passed an order refusing to sanction this petition, which order is assigned as error in the bill of exceptions.

There can be no question that the legislature of this State has power to prescribe a particular form for an indictment by a grand jury. It can dispense with all forms and provide new ones. It can declare that no particular form is essential to the validity of such instruments, or it can imperatively require that they shall contain certain words and allegations. The simple question, then, in this case, is whether or not, there being no constitutional provision bearing upon the subject, the legislature of the State has, by a mandatory provision, specifically prescribed that every indictment shall contain the language referred to in the demurrer, and entirely omitted from the indictment against the accused. We think the question is answered in the affirmative by the language used in section 929 of the Penal Code, which declares that "the form of every indictment or accusation shall be as follows." Then follows the form prescribed, concluding with the language, "contrary to the laws of said State, the good order, peace and dignity thereof." It is true, this same section of the Code provides that "every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct, which states the offense in the terms and language of this Code, or so plainly that the nature of the offense charged may be easily understood by the jury." But it is manifest that this portion of the section does not in any wise refer to the form of the indictment prescribed by the statute. It has reference to the offense itself, and to the terms and language used in describing the criminal act. It has reference to that portion of the indictment designated by parentheses in the form embodied in this section; that is, "where the offense is to be stated, and the time and place of committing the same, with sufficient certainty." The law requires simply that this statement shall be sufficiently technical and correct when the offense is charged in the terms and language of the Code, or so plainly that the nature of the offense charged may be easily understood by the jury.

In Horne v. State, 37 Ga. 80, it was decided that: "An indictment should be 'in the name and behalf of the citizens of Georgia.' If these words be omitted, on exception taken at the proper time the indictment will be quashed. Such exception is not good in arrest of judgment." In that case the words quoted in the decision are as much a formal part of the instrument as the words omitted from the indictment in this case. The statute is no more mandatory in requiring that an indictment shall proceed "in the name and behalf of the citizens of Georgia," than it is in demanding that the criminal acts shall be charged as "contrary to the laws of said State, the good order, peace and dignity thereof." If, therefore, a demurrer is good on account of the omission of a certain portion of the form prescribed for the commencement of an indictment, we cannot see why it would not be equally good on account of leaving out the words prescribed for its conclusion. In the case of Camp v. State, 25 Ga. 689, it was held that "an indictment concludes properly, if it follows the form prescribed by the statute." See also Crabb v. State, 88 Ga. 584-588, 15 S. E. Rep. 455, 456, in which Justice

Lumpkin stated in his opinion that it was not necessary that the indictment should specify any particular act upon which it is founded, but if it charges the criminal act was "contrary to the laws of said State, the good order, peace and dignity thereof," it is in this respect sufficient. We do not think the case of Loyd v. State, 45 Ga. 57, in conflict with our decision in this case. It appeared in that case that there were two counts in the indictment. The first count began and concluded in the form required by the statute. The second count, while it concluded with "contrary to the laws of said State," etc., omitted the words "And the jurors aforesaid, in the name and behalf of the citizens of Georgia." These words omitted from that count, however, appeared in the first count of the indictment. It is true, the statute requires that, where there is more than one count, each additional count shall commence with the words quoted. The words prescribed by the form having been used at the commencement of the indictment, it might be construed as qualifying all the counts that followed. This was simply a decision by two judges of this court that the form of an indictment, as prescribed by the law, need not be followed to the letter; it is sufficient if it conform in all material particulars. The writer is inclined to doubt the correctness of that decision. It seems to be against the decided weight of authority. In State v. Wagner (Mo. Sup.), 24 S. W. Rep. 219, a similar defect in one count in an indictment was held to be fatal. The old rule was adhered to in that case, that "every separate count should charge the defendant as if he had committed a distinct offense;" and in the opinion of Sherwood, J., quite an array of authorities is cited in support of the decision. The difference, however, between the case of Loyd, in 45 Ga., and the one we are now considering, is that the portion of the form omitted from this indictment was not only not followed in letter, but was entirely omitted, and not followed either in spirit or substance, or by other words substantially meaning the same thing. In entire accord with the decision in this case is the opinion of Warner, J., in Bulloch v. State, 10 Ga. 61-63.

When we consider, however, the history of technical pleading in criminal procedure, we think the question is easily solved, and that our conclusion in this case is beyond doubt correct. One special feature in an indictment, recognized at common law, was that it should conclude with words indicating that the acts committed were an offense against the peace and dignity of the sovereign power in whose name the accusation proceeded. In England the usual words were, "against the peace of our lord, the king (or lady, the queen), his crown and dignity." In this country the words are simply changed to conform to the proper designation of the sovereign power, and are generally such words as are used in the statute of our State—"contrary to the laws of the State, the good order, peace and dignity thereof." As far as our investigation has gone—which has been quite extensive—the authorities seem to be absolutely uniform, that, when the rule in relation to this particular form in an indictment is expressly provided for by the written law of a State, it must be strictly applied, and the omission of the words thus formally prescribed, either by the constitution or statute of a State, is fatal. 2 Hale, Pl. Cr. p. 187 *et seq.*; Bish. New Cr. Proc. 648-652; 10 Am. & Eng. Enc. Law, p. 513; 10 Enc. Pl. & Prac. pp. 441, 442; State v. Nunn, 29 La. Ann. 589; State v. Pemberton, 30 Mo. 376; State v. Sims, 43 Tex. 521; Lemons v. State, 4 W. Va. 755; Williams v. State, 27 Wis. 402; Rice v. State, 3 Heisk. 215; Holden v. State, 1 Tex. App. 225; Anderson v. State, 5 Ark. 444; State v. Joyner, 81 N. Car. 534; State v. Dycer (Md.), 36 Atl. Rep. 763; Wright v. State (Tex. Cr. App.), 35 S. W. Rep. 150. Some of the authorities above cited have gone to the extent of declaring that such a defect in an indictment is fatal, whether especially excepted to or not. Such is the ruling in the case of Holden v. State, 1 Tex. App. 225, above cited. This, however, is not the rule of pleading in Georgia. Section 955 of our Penal Code provides that exceptions merely to the form of an indictment shall be made before trial. Others have gone to the extent of holding that the smallest and most immaterial variation from the words prescribed would be fatally defective. In the case of Lemons v. State, 4 W. Va. 755, the supreme court of that State ruled that where the constitution required the indictment to conclude, "against the peace and dignity of the State of West Virginia," the conclusion, "against the peace and dignity of the State of W. Virginia," was not sufficient, and was fatally defective. The question made by this record, however, does not require a decision on the point as to whether any variation in the words prescribed in the form would necessarily be fatal. It may be that a substantial compliance with the form, by the use of terms varying a little from those prescribed, but meaning identically the same thing, would be sufficient. It is contended by State's counsel that, the accused in this case being charged with "unlawfully" selling liquors, this substantially complies with that part of the form prescribing the words, "contrary to the laws of said State," etc. To this it might be answered that there may be an unlawful sale of liquors against the revenue laws of the United States, without a violation of the laws of this State regulating the sale of such an article. But, in any event, there is nothing in the indictment that can possibly be urged as a compliance with the remaining portion of the form prescribed for the conclusion of this instrument, to-wit, contrary to "the good order, peace and dignity thereof." From the authorities cited, it will be seen that in many of the States the words "contrary to the statutes or laws of the States" are not adhered to in the prescribed forms, but it seems that words charging the criminal acts as an offense against the dignity of the sovereign in whose name the indictment is found are uniformly adhered to, un-

less dispensed with by statute. It is true, where no form is prescribed by the organic law of the State, its legislature can by statute provide that no indictment or accusation by a grand jury shall be deemed insufficient by reason of any defect or imperfection in matter of form not tending to the prejudice of the defendant. This was done by the act of congress embodied in section 1025 of the Revised Statutes of the United States; and it was accordingly ruled, in the case of Frisbie v. U. S., 157 U. S. 160, 161, 15 Sup. Ct. Rep. 586, that, by virtue of this provision in the Revised Statutes, the omission to charge that the offense was "contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States," was immaterial.

While in most of the cases cited above the rulings were based upon mandatory provisions of the State constitutions providing the specific words to be used in an indictment, it can, however, make no difference whether the mandate is in the constitution or the statute law; for, of course, a constitutional statute is as binding upon the court as any provision in the constitution itself. In Anderson v. State, 5 Ark. 444, it was decided that the form adopted by the constitution is merely declaratory, and in affirmance of an old principle, not the creation of a new one. Sebastian, J., delivering the opinion of the court in that case, on page 450, says: "This form derives no new consideration from its being found in the constitution. Such would have been the law without its insertion there. It was only declaratory and in affirmance of an old principle, and not a creation of a new one. Its end and office here are the same as in England, whence the form was borrowed. It is used merely as an accomplishment in the form of pleading, to indicate clearly the sovereign power offended in the violation of law." In State v. Joyner, 81 N. Car. 534, it was decided that an indictment, whether for a common-law or a statutory offense, which does not include "against the peace and dignity of the State," is fatally defective. It appears in that case that while, at one time, under the constitution of North Carolina, it was required that indictments should conclude "against the peace and dignity of the State," yet, under the constitution of force when that decision was rendered (see page 538 of opinion delivered by Smith, C. J.), this clause was left out of the organic law of the State, and that there was really no written law on the subject in that State. Notwithstanding that fact, the court held that the omission of the words was a material and fatal defect. It would seem, therefore, from the trend of authority upon the subject, that, even where there is no provision in the organic or statute law of the State in reference to the matter, the courts are bound by the doctrine of the common law, that an indictment which does not conclude with words, either substantially or literally, that the crime charged is "contrary to the laws of the State, the good order, peace and dignity thereof," is no indictment at all. In 10 Enc. Pl. & Prac. p. 441, it is declared: "It is an old rule in the law of criminal procedure that an indictment must conclude against the peace and dignity of the government whose laws have been violated; and the requirement of this conclusion, in words appropriate to our form of government, has at various times been incorporated into the organic law of many of the United States. It is also sometimes expressly provided for by statute. The rule, when established by the written law, is strictly applied; and the omission thus formally to conclude an indictment is fatal, except when the necessity is obviated by statute not inconsistent with the organic law." This text is supported by a number of decisions cited in the notes. But, instead of there being any statute in Georgia which obviates the necessity of such words, we have, on the contrary, a provision mandatory by its terms, recognizing the doctrine of the old common law on the subject, and substantially ingrafting its provisions in our statute. It is no answer to these views that this particular form of an indictment is purely technical, and cannot possibly affect any substantial rights of the accused; that its omission from the indictment cannot possibly work any prejudice or injury to the accused. The lawmaking power has a right to define what an indictment is, and prescribe such a form for it as would distinguish it from other ordinary complaints in court. When it does so prescribe in plain terms, and an instrument is presented by the grand jury of a county which does not undertake, either in substance or form, to comply with the requirements of the law, it is no indictment; and it is the duty of the court so to hold, when the question is made in the proper time and manner, as was done in this case. As Chief Justice Bleckley said in Lampkin v. State, 87 Ga. 524, 13 S. E. Rep. 524, "If he insists upon it, he has a right to be tried upon an indictment good in form as well as in substance." Our system of pleading, as a rule, wisely has more regard to the substance than it has to the form of what is alleged; but, notwithstanding the many changes which have been made in old usages pertaining to judicial procedure, this particular form of indictment now under consideration, which grew up with the common law of England, has not only not been dispensed with by our written laws, but by a positive statute has been ingrafted on our system of criminal pleading; and therefore it still exists in this State as an ancient landmark that has survived the pruning and culture of modern legislation. We think, therefore, the demurrer to the indictment in this case should have been sustained, and the indictment quashed, and that the judge below erred in refusing to sanction the petition for *certiorari*. Judgment reversed. All the justices concurring.

NOTE.—*Recent Cases on the Formal Requisites of Indictments and Informations.*—Where, in the caption of an information, the case is entitled the "State of Washington" against the defendants, naming them,

it sufficiently appears that the prosecution is in the name of the State. State v. Doe (Wash.), 6 Wash. 587, 34 Pac. Rep. 154. When an indictment is properly entitled "State of North Dakota v. (defendant)," and shows on its face that it was properly presented by "the grand jury of the State of North Dakota in and for the county of G," it sufficiently appears that the prosecution is in the name, and by authority, of the State of North Dakota. State v. Kerr (N. Dak.), 58 N. W. Rep. 27. Prefixed to each count of an indictment should be a statement showing that it was found by the grand jury. State v. Wagner, 118 Mo. 626, 24 S. W. Rep. 219. When it appears on the face of an indictment that a named grand juror served as "foreman *pro tem*," and the finding of "true bill" was signed by him as such, the presumption is that the juror was properly serving as foreman. White v. State (Ga.), 19 S. E. Rep. 49. An information for violation of a city ordinance need not conclude, "against the peace and dignity of said State;" neither is it necessary that the name of the complainant be set out in the body of the complaint, but it is sufficient if he sign and swear to the same. Curry v. State (Tex. Cr. App.), 24 S. W. Rep. 516. Act 1891, p. 240, sec. 8, authorizes an information to be filed against a person only if he is bound over at preliminary examination, or, if there has been no such examination, if it is verified by some one of his own knowledge. Section 2 provides that all informations shall be verified, but that a verification by the district attorney, upon information and belief, should be overruled, in the absence of evidence that there had been no preliminary examination. Brown v. People (Colo. Sup.), 36 Pac. Rep. 1040. An assistant prosecuting attorney need not verify an information filed by him, for he acts upon his official oath. State v. Haley, 52 Mo. App. 520. An affidavit that affiant is the prosecuting attorney in and for the county, that he knows the contents of the foregoing information, and that the same are true, when subscribed and sworn to before the clerk of the court, sufficiently verifies the information. State v. Regan, 8 Wash. 506, 36 Pac. Rep. 472. An indictment which is not indorsed a true bill, as required by Cr. Code, sec. 119, is demurrable, as the statute is mandatory. Oliver v. Commonwealth (Ky.), 25 S. W. Rep. 600. An indictment against one Marion and one Barnett will not be quashed because indorsed "State of Montana v. Marion," as Cr. Prac. Act. sec. 150, *et seq.*, requiring certain indorsements to appear on an indictment, do not require the style of the cause to be so indorsed. State v. Marion (Mont.), 36 Pac. Rep. 1044. Where words following the third count in a complaint applied to all the counts, and none of them are good without such averments, all of the counts are bad. Commonwealth v. Crossly, 162 Mass. 515, 39 N. E. Rep. 278. Omission of the conclusions to a count that the offense charged was "contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States," is a matter of form, which does not tend to the prejudice of the defendant, and is therefore, by the provisions of Rev. St. sec. 1025, to be disregarded. Frisbie v. United States, 157 U. S. 160, 15 S. C. Rep. 586. Where an indictment in one count charges defendant with breaking and entering a building with intent to steal, and in another count charges him with an attempt to commit such crime, and at the end of each count former indictments are alleged, preceded by the words, "And the jurors for the commonwealth on their oath do further present," and followed by the words, "against the peace of the commonwealth, and contrary to the statute in such case made and provided," the indictment will be construed as containing only two counts, and the words quoted will be rejected as surplusage. Commonwealth v. Walker (Mass.), 39 N. E. Rep. 1014. An information not verified by some competent person is fatally defective. State v. Sayman, 1 Mo. App. Rep. 366. Where the prosecuting attorney files the information, an affidavit of the third person is not necessary. State v. Sweeney, 56 Mo. App. 409. An information filed by the prosecuting attorney in the circuit court during the term, or with the clerk in vacation, is fatally defective if not verified by him or by the oath of some person competent to testify. State v. O'Connor, 58 Mo. App. 457. The fact that an indictment complying with the provision of Const. art. 86, that "all prosecutions shall be carried on in the name and by the authority of the State of Louisiana, and conclude 'against the peace and dignity of the same,'" is preceded by "State of Louisiana, Parish of Nachitoches, December Term, A. D. 1894," does not render it repugnant to said provision. State v. Valsin, 47 La. Ann. 115, 16 South. Rep. 768. The fact that an indictment is signed by the wrong person, as county attorney, is not ground for reversing a conviction. State v. Kovolosky (Iowa), 61 N. W. Rep. 223. An indictment in accordance with the form prescribed by statute is sufficient. Lewis v. State (Ala.), 18 South. Rep. 693. Where the foreman of the grand jury writes at the foot of an indictment, immediately succeeding the last count therein, "A true bill," and signs his name thereto, the indictment is sufficiently indorsed, within Code, Crim. Proc. sec. 98. State v. Jones (Kan. App.), 2 Kan. App. 1, 42 Pac. Rep. 392. An indictment is properly quashed for noncompliance with Cr. Code, sec. 119, requiring it to be indorsed, "A true bill," and the indorsement to be signed by the foreman of the grand jury. Commonwealth v. Louisville & N. R. Co. (Ky.), 32 S. W. Rep. 132. An indictment for murder, which is otherwise sufficient, is not defective because the conclusion commences, "And the grand jury aforesaid, upon their oaths aforesaid, do say," etc., instead of, "And so the grand jury aforesaid," etc. State v. Jones (Mo. Sup.), 35 S. W. Rep. 607. Under Const. Tex. art. 5, sec. 12, requiring all indictments to conclude, "against the peace and dignity of the State," an indictment which omits the word "against," its place being supplied by "ainst," is fatally defective. Bird v. State (Tex. Cr. App.), 35 S. W. Rep. 382. An affidavit and information which do not contain the title of the cause and the name of the court as required by Rev. St. 1894, sec. 1800 (Rev. St. 1881, sec. 1731), are cured by Rev. St. 1894, sec. 1825 (Rev. St. 1881, sec. 1756), which provides that no information shall be deemed invalid for "any defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." Rivers v. State (Ind. Sup.), 42 N. E. Rep. 1021. An information reciting that "S, county attorney of M county, Texas, upon affidavit of R, hereto attached and made a part hereof, and in behalf of the State, presents into the county court of M, county," etc., sufficiently shows that the information was presented by the county attorney. Arbuthnot v. State (Tex. Cr. App.), 34 S. W. Rep. 269. An information or complaint which does not conclude, "against the peace and dignity of the State," as required by Const. art. 6, sec. 28, is insufficient. Simpson v. State (Ala.), 20 South. Rep. 572. Under Const. art. 6, sec. 30, providing that all process shall run in "the name of the people of the State of Colorado," and conclude "against the peace and dignity of the same," an information concluding "against the peace and dignity of the same people of

the State of Colorado" is sufficient as to the conclusion. Holt v. People (Colo. Sup.), 45 Pac. Rep. 374. The closing of the information, "contrary to the form of the statute," applies to each count, and it is not necessary to insert these words after the several counts. State v. Scott (La.), 48 La. Ann. 293, 19 South. Rep. 141. Under Const. Tex., art. 5, sec. 12, providing that all prosecutions shall be carried on in the name and by the authority of the State, and shall conclude "against the peace and dignity of the State," an information for violation of the local option law which fails to conclude "against the peace and dignity of the State," is fatally defective. Wright v. State (Tex. Cr. App.), 35 S. W. Rep. 150. That the name of the prosecuting attorney on the indictment was typewritten instead of being signed with pen and ink, is immaterial. Miller v. State (Tex. Cr. App.), 35 S. W. Rep. 391. Neither a misnomer of a crime, nor the omission to give it any name, in the caption of an indictment, affects the validity of the indictment. State v. Howard (Minn.), 34 L. R. A. 178, 68 N. W. Rep. 1096. An indictment need not state the title of the court within whose jurisdiction the crime is charged to have been committed. State v. Daniel, 49 La. Ann. 954, 22 South. Rep. 415. The provision of Const., art. 4, sec. 13, requiring all indictments to conclude, "against the peace, government and dignity of the State," is mandatory. State v. Dycer (Md.), 85 Md. 246, 36 Atl. Rep. 763. Name of person indicted need not be indorsed on the indictment as witness, though he testified before the grand jury. People v. Page (Cal.), 116 Cal. 386, 48 Pac. Rep. 426. The indorsement on an information of the words "rape and incest," in connection with the word "information," is not ground for reversal, where such words aptly summarized the facts stated in the information, and no objection thereto was made below. Fager v. State (Neb.), 49 Neb. 439, 68 N. W. Rep. 611. An indorsement by the grand jury on an indictment as founded upon "presentment" is not erroneous because not founded on their own knowledge, but on testimony heard by them. Commonwealth v. Hurd, 177 Pa. St. 481, 35 Atl. Rep. 682. An indictment properly returned by the grand jury need not be signed by the prosecuting attorney. Even if required and omitted, such omission would not be fatal, under Rev. St., sec. 7215, providing that no indictment shall be deemed invalid for any defect or imperfection which does not tend to prejudice the substantial rights of the defendant upon the merits. Jones v. State, 14 Ohio Cir. Ct. Rep. 35, 7 Ohio Dec. 304. Under Rev. St. 1894, sec. 1802 (Rev. St. 1881, sec. 1733), declaring that an information need not state why the proceeding is by information instead of indictment, it is unnecessary to allege that the court is in session, and that the grand jury has been discharged for the term. State v. Suggins (Ind. Sup.), 45 N. E. Rep. 603. The conclusion against the peace and dignity of the State, although following the allegation negativing prescription, will be deemed to refer to the body of the information. State v. Hinton, 49 La. Ann. 1354, 22 South. Rep. 617. It is not essential to the validity of an information that it should conclude "against the peace and dignity of the State." Bolin v. State (Neb.), 71 N. W. Rep. 444. A mistake in the caption of an indictment, in regard to the time it was presented, does not vitiate the indictment, since the caption is not a part thereof. George v. People, 167 Ill. 417, 47 N. E. Rep. 741. The caption of an indictment need not contain the name of the person indicted. State v. Parks, 39 Atl. Rep. 1023. If it appears on the face of an indictment that it was the act of the grand jury of the proper county, it is not necessary that it should state that the grand jurors were sworn. Hart v. State, 44 S. W. Rep. 1105. An objection that the indictment recited that it was presented "upon the oath" of the grand jurors, when in fact it was presented upon the oath of all but one, who affirmed instead of making oath, is a merely formal defect, without prejudice, which is cured by the provisions of Rev. St., sec. 1025. Bram v. United States, 168 U. S. 532, 18 Sup. Ct. Rep. 183. An objection that neither in the indictment nor in the proof at the hearing of pleas in abatement did it affirmatively appear that a grand juror, who was permitted to affirm instead of making oath, had conscientious scruples against taking an oath, is without merit, in view of the curative provisions of Rev. St., sec. 1025, and in view of the fact that the mode of ascertaining the existence or non-existence of such scruples is committed to the discretion of the officer who affirmed the jury. Bram v. United States, 168 U. S. 532, 18 Sup. Ct. Rep. 183. Where the first count of an indictment alleges that it was presented in and to the district court of N county, the allegation need not be repeated in subsequent counts. Anderson v. State, 44 S. W. Rep. 824. Under Rev. St., sec. 2893, providing that no indictment shall be quashed because of any defect in the indictment unless such defect is misleading, etc., it is immaterial that an indictment concludes against the form of the "statutes," where it should properly conclude against the form of the "statute." Michael v. State, 23 South. Rep. 944. Each count of an indictment for murder concluded, "Against the peace and dignity of the people of the State of Illinois," instead of "Against the peace and dignity of the 'same' people of the State of Illinois." Held that, though the latter term is that used in the constitution, the omission of the word "same" did not vitiate the indictment. Kiekham v. People, 170 Ill. 9, 48 N. E. Rep. 465. The omission of the words "in the peace of the State" does not vitiate an indictment for murder. State v. Robertson, 23 South. Rep. 510. Since it is wholly immaterial whether the indictment was signed, it was not error to permit the county attorney to sign it in the name of the foreman of the grand jury. Witherspoon v. State, 44 S. W. Rep. 164. Under Pen. Code, sec. 809, requiring that the information be "subscribed by the district attorney," an information entitled, "In the Superior Court of the county of San Diego, State of California," charging an offense committed by defendant "at the said county of San Diego, in the said State of California," and signed "A. H. Sweet, district attorney of the said county of San Diego," was sufficiently subscribed. People v. Ebanks, 117 Cal. 652, 40 L. R. A. 269, 49 Pac. Rep. 1049. The improper signing of an information by an assistant prosecuting attorney is mere formal error or irregularity, and does not render it entirely nugatory. Appeal of Browne, 69 Mo. App. 159.

BOOKS RECEIVED.

The American State Reports, Containing the Cases of Value and Authority Subsequent to Those Contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States. Selected, Reported and Annotated, By A. C. Freeman, and the Associate Editors of the "American Decisions." Vol. 63. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers, 1898.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACCORD AND SATISFACTION—Statement and Settlement of Account.—A stated and settled account is only *prima facie* evidence of its correctness, and does not preclude the parties from giving evidence that it did not include all the demands between them, nor operate as an accord and satisfaction as to matters not included therein nor considered between the parties prior to its settlement.—BURRILL v. CROSSMAN, U. S. C. C. of App., Second Circuit, 91 Fed. Rep. 543.

2. ACTION—Contract for Plaintiff's Benefit.—Plaintiff may maintain an action on a contract made by defendant with another for his benefit.—WALL v. ALFORD, Ky., 49 S. W. Rep. 444.

3. ADMINISTRATION—Collateral Attack.—The validity of the appointment of an administrator, made by a court of general probate jurisdiction, cannot be questioned collaterally in an action brought by such administrator to recover for the tortious killing of his decedent, it not appearing but that a judgment in the action would not render the matters involved *res judicata*.—MCGEHEE v. MCCARLEY, U. S. C. C. of App., Fifth Circuit, 91 Fed. Rep. 462.

4. ADMINISTRATION—Widow's Application.—Proceedings by a widow to have the whole of an estate set aside to her without administration, as authorized by Code Civ. Proc. § 1469, abate on her death, where there are no minor children; and hence, where she dies pending an appeal from an order denying her application, the appeal will be dismissed.—IN RE BACHELDER'S ESTATE, Cal., 56 Pac. Rep. 97.

5. ADMIRALTY—Possessory Action.—A possessory action in admiralty will not lie merely for the refusal of a collector of customs to issue papers to a vessel, though such vessel may have been temporarily prevented from navigating as the result of the collector's non-action.—BRENT v. THORNTON, U. S. C. C. of App., Fifth Circuit, 91 Fed. Rep. 546.

6. ADVERSE POSSESSION—Parol Gift of Land.—Adverse possession for 15 years under a parol gift of land by father to son by way of advancement gives title.—LYNN v. CANNADA, Ky., 49 S. W. Rep. 461.

7. APPEAL.—Where one of several defendants is granted a separate appeal from a judgment against all, as authorized by Code, § 400, and he executes an appeal bond, as required, such appeal is not affected by the fact that other defendants who were also granted an appeal failed to join in the bond.—CAMPBELL v. EQUITABLE SECURITIES CO., Colo., 56 Pac. Rep. 88.

8. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Any instrument which by a transfer of property creates a trust in a trustee for the benefit of creditors is an assignment, and its form in other respects is not material.—WAMBAUGH v. NORTHWESTERN MUT. LIFE INS. CO., Ohio, 52 N. E. Rep. 839.

9. ASSIGNMENT FOR CREDITORS — Preference.—Payments made by an insolvent debtor to certain of his creditors, when pressed by them and their attorney, were not made with intent to prefer, and did not operate as an assignment, under the statute.—DIAMOND COAL CO. v. CARTER DRY GOODS CO., Ky., 49 S. W. Rep. 438.

10. ASSIGNMENTS FOR CREDITORS—Purchase of Trust Estate by Assignee.—Where, at a sale of an assigned estate to satisfy a mortgage lien thereon, the assignee became the purchaser, and afterwards conveyed the property to persons to whom the assignor had before the assignment sold and contracted to convey it, he must account to the creditors for the amount received by him from such persons, and not merely for the amount of his bid, as he only carried out the assignor's contracts in conveying to them.—MITCHELL v. TYLER, Ky., 49 S. W. Rep. 422.

11. ASSUMPSIT — Common Counts.—A complaint alleging that defendant is indebted to plaintiff in a certain sum, for work done and materials furnished by plaintiff for defendant, at his special request, of the reasonable worth of said sum, which is due and unpaid, states a cause of action.—INCORPORATED TOWN OF ROCHESTER, IND., v. BOWERS, Ind., 52 N. E. Rep. 814.

12. ASSUMPSIT—Recovery of Money Paid under Mistake of Law.—Money paid to a gas company as meter rent under a mistake of law may be recovered, though the payment was voluntary.—CAPITAL GAS & ELECTRIC LIGHT CO. v. GAINES, Ky., 49 S. W. Rep. 462.

13. BANKRUPTCY—Effect of Discharge — Merger.—A cause of action does not become merged in a judgment thereon, so as to preclude the plaintiff from showing that the original debt was created by the fraud of the debtor, for the purpose of avoiding the effect of a discharge in bankruptcy, subsequently obtained by the debtor.—PACKER v. WHITTIER, U. S. C. C. of App., First Circuit, 91 Fed. Rep. 511.

14. BANKRUPTCY — Mortgagee of Bankrupt. — The holder of a chattel mortgage, having notice of proceedings in bankruptcy against the mortgagor, has no right, after the adjudication and before the appointment of a trustee, and without leave of the bankruptcy court, to sell the property of the bankrupt on foreclosure of his mortgage, where the proceedings on foreclosure were not such as to bring the *res* within the jurisdiction of a State court, and there was no exclusive

possession of the property, before the adjudication, by the officer making the sale. A sale so made is unlawful and void, and passes no title.—IN RE BROOKS, U. S. D. C., D. (Vt.), 91 Fed. Rep. 508.

15. BANKRUPTCY—Priority of Debts—Wages of Labor.—Although Bankruptcy Act 1898, § 64b, gives priority of payment out of bankrupt estates to wages due to workmen, clerks, and servants only when they have been "earned within three months before the date of the commencement of proceedings" in bankruptcy, yet, where an act of bankruptcy, which caused a suspension of the debtor's business, occurred on August 31, 1898, and a petition in involuntary bankruptcy was filed against it on the earliest day allowed by section 71 of the act, viz.: November 1, 1898, priority will be accorded to wages of workmen earned within three months before August 31st, instead of limiting them to three months before November 1st; effect being thus given to the manifest general purpose of congress in regard to the preference of labor claims, as against the specific limitation in section 64b, which is contradictory of such general purpose.—IN RE ROUSE, U. S. D. C., N. D. (Ill.), 91 Fed. Rep. 514.

16. BANKRUPTCY—Seizure of Property—Sufficiency of Affidavits.—When application is made, under Bankruptcy Act 1898, § 69, for a warrant to the marshal to seize and hold property of the alleged bankrupt, pending an involuntary petition against him, the affidavits in support of the application must set forth fully and specifically all the essential facts, including the insolvency of the debtor and the facts constituting the alleged act of bankruptcy or neglect of his property by the debtor.—IN RE KELLY, U. S. D. C., W. D. (Tenn.), 91 Fed. Rep. 504.

17. BANKRUPTCY—Taxes on Exempt Property—Payment by Trustee.—Under Bankruptcy Act 1898, § 64, requiring the trustee to "pay all taxes legally due and owing by the bankrupt in advance of the payment of dividends to creditors," it is the duty of the trustee to pay, out of the estate in his hands, taxes legally assessed and due on the homestead of the bankrupt, and constituting a lien thereon at the time of the adjudication, although such homestead has been set apart to the bankrupt as exempt under the act.—IN RE TILDEN, U. S. D. C., S. D. (Iowa), 91 Fed. Rep. 500.

18. BILLS AND NOTES—Bills of Exchange—Presentment.—Where an unaccepted sight draft, indorsed: "Accepted. Payable at F & M Bank," is sought to be presented two days before maturity, the conclusive presumption is that the presentment was to be for acceptance, and not payment.—BURRUS V. LIFE INS. CO. OF VIRGINIA, N. Car., 32 S. E. Rep. 823.

19. BILLS AND NOTES—Collection.—Paying a note in suit by giving a new note is not a collection thereof, within a stipulation providing for payment of an attorney's fee in case of collection by an attorney.—DAVIS V. COCHRAN, Miss., 24 South. Rep. 906.

20. BILLS AND NOTES—Notes—Assumption by Third Person.—The maker of a note can recover against a third person who had assumed it only after paying it himself, since, as between themselves, the maker, as against the person assuming it, is a surety.—TIBBET V. ZURBUCH, Ind., 52 N. E. Rep. 815.

21. BILLS AND NOTES — Protest.—A bill of exchange need not be protested as against the acceptor.—GILLESPIE V. PLANTERS' OIL-MILL & MFG. CO., Miss., 24 South. Rep. 900.

22. BILLS AND NOTES—Negotiability—What Law Governs.—The negotiability of a note executed in a foreign State will be determined according to the common law, where the statutes of such State relating thereto are not pleaded.—HOLMES V. BANK OF FT. GAINES, Ala., 24 South. Rep. 959.

23. BILLS AND NOTES—Negotiable Note — Attorney's Fee.—Civ. Code, § 3991, defines a "negotiable instrument" as a written promise or request to pay a certain sum to order or bearer, in conformity to the provisions of the article. Section 3992 requires that it be payable in money only, and without any condition not certain of fulfillment. Sections 3994 and 3996 provide that such an instrument may give the payee the option to pay the sum specified or perform another act, and may contain a pledge or collateral security. Section 3997 provides that such instrument must not contain any other contract than as specified. Held, that a note stipulating for payment of attorney's fees in case of suit is not negotiable.—STADLER V. FIRST NAT. BANK OF HELENA, Mont., 56 Pac. Rep. 711.

24. BUILDING AND LOAN ASSOCIATIONS — Stock—Forfeiture.—Where a building and loan association declares stock in the association forfeited because of the holder's failure to pay interest on money borrowed by him, it releases him from the obligation to pay any fines thereafter.—ARMSTRONG V. DOUGLAS PARK BLDG. ASSN., Ill., 52 N. E. Rep. 886.

25. CARRIERS OF GOODS — Delay in Shipment — Quarantine.—When a superintendent of a railroad receives an order relating to passengers, to the effect that trains will not be allowed to stop at a quarantined town, he has a reasonable time to ascertain whether the order applies to freight, before the road can be held liable for receiving goods which it cannot deliver.—ALABAMA & V. RY. CO. V. HAYNE, Miss., 24 South. Rep. 607.

26. CARRIERS OF PASSENGERS—Delay Caused by Quarantine.—Allegations that a contract limiting defendant carrier's liability was never assented to by plaintiff; that the agent of a connecting carrier aided quarantine officers in wrongful treatment of plaintiff; that defendant's agent informed plaintiff that he would not be hindered by quarantine regulations; that he relied on such representations instead of going by another route; and that the agent knew, and plaintiff did not know, that quarantine regulations were in force,—state a cause of action.—ST. CLAIR V. KANSAS CITY, ETC. R. CO., Miss., 24 South. Rep. 904.

27. CERTIORARI — Receiver.—*Certiorari* will lie to review an order appointing a receiver, so as to determine, from the case as presented to the lower court, whether jurisdiction existed in such court, in the particular case made, to appoint a receiver.—SWEENY V. MAYHEW, Idaho, 56 Pac. Rep. 85.

28. CHATTEL MORTGAGE—Delivery—Validity.—Delivery of possession under a mortgage before rights have been acquired by others will cure any validity there may be in the instrument arising from an insufficient execution of it, omission to record it, or from its containing a provision which makes it void except between the parties.—LEECH V. ARKANSAS CITY MFG. CO., Kan., 56 Pac. Rep. 134.

29. CHATTEL MORTGAGES — Description of Debt of Property.—A mortgage of a crop for a stated year, and for every year thereafter until the debt is fully paid, is not void for uncertainty as to crops raised subsequent to the year named.—TRUSS V. HARVEY, Ala., 24 South. Rep. 927.

30. CONTRACT—Action for Services—Recoupment.—In an action by an architect for services rendered, an instruction that if plaintiff did not use reasonable care in performing his work; and the buildings were not properly constructed, defendant might recoup damages sustained, was properly refused, as it allowed defendant to recoup, though the improper construction was not due to plaintiff's fault.—LINDEMAN V. FRY, Ill., 52 N. E. Rep. 851.

31. CONTRACT—Gambling Contract—Condition.—Provision in a contract of sale of bonds, made a condition of the purchase, that, if the buyer desire to resell to the seller at a certain time, the seller will buy them back at the price paid, with interest, merely makes the contract one of conditional sale, and not a gambling contract, within Rev. St. ch. 38, § 130, declaring a punishment for whoever contracts to have or give to himself or another the option to sell or buy at a future time any stock, and declaring contracts made in violation thereof gambling contracts.—WOLF V. MCNULTA, Ill., 52 N. E. Rep. 896.

32. CONTRACT — Consideration — Guaranty.—There is sufficient consideration to support an agreement to answer for the debt of another, when the creditor is thereby induced by the promisor to relinquish a valuable lien which he had acquired upon property to secure the original debt.—BLUTHENTHAL v. MOORE, Ga., 32 S. E. Rep. 344.

33. CONTRACTS—Principal and Surety.—Under a contract for erecting a building, between a school district and a contractor, whereby the latter was required to give bond for the protection of the school district and all persons furnishing materials, the bond may be enforced by a material-man, though he is not a party to the contract, where he has a valid claim against the contractor for materials furnished.—SCHOOL DIST. OF KANSAS CITY v. LIVERS, Mo., 49 S. W. Rep. 507.

34. CONTRACT—Rescission for Fraud.—One cannot rescind a trade for fraud by demanding a re-exchange, without offering to return the property he received, though he has it with him when the demand is made.—SAMPLES v. GUYER, Ala., 24 South. Rep. 942.

35. CONTRACT — Subscription — Delivery.—Defendant signed a subscription for the building of a church, promising absolutely to pay the subscription as stated therein. Held that, while he might withdraw before the subscription was delivered, he could not do so after delivery, since on delivery it became a contract, and obligated each subscriber to pay according to its terms, independent of the liability of others.—ROTHENBERGER v. GLICK, Ind., 52 N. E. Rep. 811.

36. CONTRACTS — Supplemental Agreement.—A supplemental agreement for a lien on lumber for the price thereof, made before performance of the contract of sale or delivery of the lumber under it, was valid.—PENEIX v. RODGERS, Ky., 49 S. W. Rep. 447.

37. CONTRACT FOR PUBLIC WORK—Assignment—Subcontract.—A contractor with the United States for the construction of public improvement does not, by contracting with a third party to furnish material for such work, make an assignment or a transfer of his contract, within the prohibition of Rev. St. § 3737.—UNITED STATES v. FARLEY, U. S. C. C., N. D. (Iowa), 91 Fed. Rep. 474.

38. CORPORATIONS — Meeting of Directors.—Proceedings at a special meeting held by a bare majority of the board of directors, without notice to the other members, are void, although all of those present voted in favor of the action taken, and the result would have been the same had the other members been present.—VAUGHT v. OHIO COUNTY FAIR CO., Ky., 49 S. W. Rep. 426.

39. CORPORATION—Stockholder's Liability — Federal Court.—The Ohio statute provides that the constitutional liability of stockholders of a corporation may be enforced by an action which shall be for the benefit of all the creditors and against all the stockholders, and that in such action there shall be determined the amount payable by each stockholder on all the indebtedness of the corporation. Held that, where the contemplated statutory ascertainments had not been made, the liability would not be enforced by a federal court in a sister State in a suit by a single creditor in which neither all the stockholders nor the corporation were made parties.—STATE NAT. BANK OF CLEVELAND, OHIO, v. SAYWARD, U. S. C. C. of App., First Circuit, 91 Fed. Rep. 443.

40. CURTESY—Sale.—A sale by the father of land in which he had a curtesy right gives the daughter, who holds the fee, no right to any of the proceeds of the sale, since the father could not sell the fee.—WEAR & BOOGHER DRY-GOODS CO. v. SMITH, Ark., 49 S. W. Rep. 493.

41. COURTS—Jurisdictional Amount — Injunction.—In a suit to enjoin a trades union from interfering with plaintiff's workmen, or otherwise disturbing their business affairs, the amount involved is not the value of plaintiff's property, but the damages that will probably result thereto if the injunction be denied, or that will probably result to defendant if the injunction be granted; hence, in the absence of allegations as to the amount of damages, the supreme court has no jurisdiction of an appeal in the case.—AUGUST GAST BANK NOTE & LITHOGRAPHING CO. v. FENNIMORE ASSN. NO. 5, OF ST. LOUIS, Mo., 49 S. W. Rep. 511.

42. CRIMINAL EVIDENCE — Confidence Games.—Conversations, in accused's absence, between prosecuting witness and those who assisted in the commission of the crime, are admissible, where accused was the principal or an accessory before the act.—VAN EYCK v. PEOPLE, Ill., 52 N. E. Rep. 852.

43. CRIMINAL LAW—Former Jeopardy.—Where an accusation under which one is tried and found not guilty is void, because it did not charge him with the commission of any offense, the accused was not in jeopardy; and on a subsequent trial, under an accusation which did legally charge him with the same offense, it was not error to instruct the jury that the former accusation was a nullity, and that they should not consider the same.—SIMMONS v. STATE, Ga., 32 S. E. Rep. 339.

44. CRIMINAL LAW—Homicide—Venue.—The courts of the State where the mortal wound is inflicted have jurisdiction of the offense, though the deceased died in another State.—STATE v. GARRISON, Mo., 49 S. W. Rep. 508.

45. CRIMINAL LAW—Homicide.—Where there was evidence tending to show that accused and deceased began shooting simultaneously when deceased appeared, the court should have instructed the jury that if accused commenced the difficulty by making the first demonstration to shoot, or if both deceased and accused went on the premises armed, determined on a conflict, and, on meeting, the conflict was by mutual consent, then accused could not rely on the right of self-defense, unless he in good faith withdrew from the conflict, and only re-engaged in it afterwards in defense of his son.—UTTERBACK v. COMMONWEALTH, Ky., 49 S. W. Rep. 479.

46. CRIMINAL LAW—Limitation of Prosecution.—To constitute a fleeing from justice, within the meaning of Rev. St. § 1045, which will suspend the running of limitation against an indictment for an offense, it is not necessary that the accused shall have been found within the jurisdiction of another court.—PORTER v. UNITED STATES, U. S. C. C. of App., Fifth Circuit, 91 Fed. Rep. 494.

47. CRIMINAL LAW—Receiving and Concealing Stolen Goods.—Receiving or concealing different articles of property at different times, and on separate occasions, constitute distinct offenses, and cannot be prosecuted as one crime, though all the property be thereafter found in the possession of the defendant at one time and place; and, in such case, a conviction for a felony, based on the aggregate value of all the property, cannot be sustained, when the value of that received or concealed on each of such occasions is less than $35.—SMITH v. STATE, Ohio, 52 N. E. Rep. 826.

48. DEATH BY WRONGFUL ACT—Right of Action.—A father, as such, cannot maintain an action to recover for the loss of services upon the death of his son, caused by the negligence of another. The action to recover pecuniary damages resulting to him by the death of his son is only maintainable, under the death act (1 Gen. St. p. 1188), by the personal representative of the deceased son.—FITZHENRY v. CONSOLIDATED TRACTION CO., N. J., 42 Atl. Rep. 416.

49. DEED INTENDED AS A MORTGAGE—Evidence.—Recital of a consideration, in a deed, larger than a debt due from the grantor to the grantee at the time it was executed, is evidence that it was intended as an absolute conveyance, and not a mortgage.—SHIVER v. ARTHUR, S. Car., 32 S. E. Rep. 310.

50. DIVORCE—Computation of Time of Separation.—Under Ky. St. § 2117, authorizing a divorce on the ground that the parties have lived apart without any cohabitation "for five consecutive years next before the application," where the wife left the husband's home July 10, 1892, a petition filed July 10, 1897, was not

premature, as the computation, being from an act done, and not from the day, must include the day on which the act was done.—IRWIN v. IRWIN, Ky., 49 S. W. Rep. 432.

51. EMINENT DOMAIN—Proceedings to Condemn.—Where parties to a condemnation proceeding proceeded to trial on the theory that they could not agree as to the compensation to be paid, and the whole contest was as to the value of the property, an objection on appeal that it was not shown by direct proof that they could not agree as to the price is unavailing.—SCHUSTER v. SANITARY DIST. OF CHICAGO, Ill., 52 N. E. Rep. 855.

52. EMINENT DOMAIN — Unreasonable Exercise.—A water company which has power of eminent domain does not unreasonably exercise its discretion in selecting a route for its pipes across an individual's land instead of along a public road, as the laying of its pipes along such road would be an additional servitude, for which it would have to pay.—BIDDLE v. WAYNE WATERWORKS CO., Penn., 42 Atl. Rep. 380.

53. ESTOPPEL—Evidence—Receipts.—In order to estop the maker of a receipt, which was given for the purpose of inducing action on the part of a third party, to dispute the validity thereof, such party must show that he has been injured by action in reliance thereon.—ATKINS v. PAYNE, Penn., 42 Atl. Rep. 378.

54. FEDERAL COURTS — Jurisdiction—Injunctions.—Proceedings under an execution against property, issued to enforce a money judgment rendered in a State court, are proceedings in such court, within the meaning of Rev. St. § 720, and cannot be restrained by an injunction issued by a federal court; but, if the sheriff levies upon property not owned by the judgment defendant, his acts are contrary to the command of the writ, and are not proceedings in the court, within such section.—PROVIDENT LIFE & TRUST CO. OF PHILADELPHIA v. MILLS, U. S. C. C., D. (Wash.), 91 Fed. Rep. 485.

55. FEDERAL OFFENSE — Forgery — Indorsement of Government Draft.—The forging of an indorsement on a genuine government draft, and the uttering of the draft so indorsed, are each offenses punishable under the statutes of the United States.—DE LEMOS v. UNITED STATES, U. S. C. C. of App., Fifth Circuit, 91 Fed. Rep. 497.

56. FIXTURES—What Constitute.—A lathe so heavy as to require no fastening to hold it in place, and which was readily connected, when its use was desired, by a belt with an overhead shaft, and which was an essential part of the machinery of a manufacturing plant as originally planned and operated, held to be a part of the realty, and to have been conveyed under a tax deed conveying such realty.—GREEN v. CHICAGO, R. I. & P. R. CO., Kan., 56 Pac. Rep. 136.

57. FRAUDULENT CONVEYANCES — Consideration.—A grantee in a voluntary conveyance must show, as against pre-existing creditors of the grantor, that the grantor left out of the conveyance property easily accessible to execution, amply sufficient, in the ordinary course of events, to satisfy his then-existing liabilities.—GOLDEN v. GOODE, Miss., 24 South. Rep. 905.

58. FRAUDULENT CONVEYANCES—Pledge.—A pledgee of stock transferred the right to a dividend to the pledgor; and, with his consent, complainant, a creditor, collected part of the dividend and applied it on his claim. Later the stock was transferred to yet another creditor in pledge, and the pledgor, without consideration, and to defraud complainant, transferred the right to said dividend to the same creditor; and, to aid the pledgor in putting the dividend beyond complainant's reach, this creditor sought to recover the dividend by action against the corporation that declared it. Held, that complainant was entitled to relief.—HENTZ v. DELTA BANK, Miss., 24 South. Rep. 902.

59. GUARANTY—Construction of Contract.—Plaintiffs issued a letter of credit to K S Co., authorizing it to make drafts on London bankers in payment of the invoice price of merchandise "to be shipped" to American ports, taking an agreement from K S Co. at the same time to protect and secure the payment of the drafts, on which agreement defendant became guarantor. Held, that drafts made under such letter of credit, in payment for merchandise which had been purchased and shipped for an American port some three weeks before the letter was issued or the contract executed, were not within the terms of the guaranty.—FOERDERER v. MOORS, U. S. C. C. of App., Third Circuit, 91 Fed. Rep. 476.

60. GUARANTY—Notice of Acceptance.—To hold a guarantor who is entitled to notice of the acceptance of the guaranty, direct proof of such notice is not essential, and it is sufficient if facts and circumstances appear to warrant the jury in finding that the guarantor had received such notice in reasonable time, and thereupon had taken steps to secure himself.—BARNES CYCLE CO. v. REED, U. S. C. C. of App., Third Circuit, 91 Fed. Rep. 481.

61. HABEAS CORPUS—Custody of Child.—In *habeas corpus* proceedings to recover the custody of an infant, if it is found that such infant is not illegally restrained, the court is not bound to determine who is entitled to its guardianship, nor to deliver it into the custody of any particular person, though it may do so, in its discretion, if of the opinion that, under the circumstances shown, it ought to be done.—UNITED STATES v. SAUVAGE, U. S. C. C., W. D. (Penn.), 91 Fed. Rep. 490.

62. HOMESTEAD—Abandonment.—Declarations made by a debtor in good faith of his intention to return to a home he has left are admissible to show that there was no abandonment of the homestead.—CINCINNATI LEAF TOBACCO WAREHOUSE CO. v. THOMPSON, Ky., 49 S. W. Rep. 446.

63. HOMESTEAD—Exemptions.—Rev. St. § 2129, giving a certain homestead exemption in a decedent's property to his widow and children, includes children of age living apart from their parents as heads of families.—EX PARTE WORLEY, S. Car., 32 S. E. Rep. 807.

64. HOMESTEAD—Hotel Property.—The fact that the homestead is occupied in whole or in part as an hotel does not deprive it of any of the benefits or immunities prescribed by the statutes, so long as it is used and occupied by the owner as a home and residence of himself and family, and is within the limitations of the statute as to value.—KIESEL v. CLEMENS, Idaho, 56 Pac. Rep. 84.

65. HOMESTEAD—Liability for Debts.—The provision of Ky. St. § 1702, that the homestead exemption shall not apply against a debt which existed prior to the "purchase" of the land, does not apply to a homestead inherited after the creation of the debt to which the creditor seeks to subject it.—HESTER v. LINN, Ky., 49 S. W. Rep. 431.

66. HUSBAND AND WIFE—Contracts.—A promise by the wife to the husband to pay a note, which he had previously assumed, cannot be enforced by the holder of the note, unless it could be enforced by the husband.—BROWN v. DALTON, Ky., 49 S. W. Rep. 448.

67. HUSBAND AND WIFE — Conveyances in Trust.—A husband and wife deeded property in trust for the permanent support of the wife and children, and to educate the latter, without prescribing how it should devolve after the trust was executed. Held, that it carved out of the estate in the property a usufructuary interest in favor of the wife and children, leaving what remained unaffected, and hence subject to alienation by the grantors.—MONDAY v. VANCE, Tex., 49 S. W. Rep. 516.

68. INFANCY — Sales — Rescission — Ratification.—A minor bought horses, for which he gave his note and other considerations. After he became of age, he first used the horses in his business, and then sold them as his own. In a suit brought by him to recover the consideration paid, he claimed that he had rescinded the contract of purchase, but prior to his use and sale of the horses. Held, that the conduct of the plaintiff in

the use and sale of the horses was not only an abandonment of the attempted rescission, but was a ratification of the original bargain.—HILTON v. SHEPHERD, Me., 42 Atl. Rep. 387.

69. INJUNCTION—Contempt.—The grantee of one who has been enjoined from diverting the waters of a stream connected with his land is bound by the injunction, though he was not a party to the suit in which it was ordered.—AHLERS v. THOMAS, Nev., 56 Pac. Rep. 93.

70. INSURANCE — Construction of Policy.—A fire policy, providing a certain amount of insurance "on freight cars, the property of other roads, for which the assured are or may be liable, while on the line of their road," insures the cars, and not the liability thereon of assured, a railroad company doing a terminal business, taking cars over its tracks in a city to manufactories and elevators; the words, "for which the assured are or may be liable," being descriptive of the cars, and meaning such cars of other companies on assured's tracks as it had such control of, or such connection with, as that a liability might accrue against it to account therefor.—HOME INS. CO. OF NEW YORK v. PEORIA & P. U. RY. CO., Ill., 52 N. E. Rep. 862.

71. INSURANCE — Oral Contract.—An oral contract of insurance is enforceable.—NAT. FIRE INS. CO. v. RAWE, Ky., 49 S. W. Rep. 422.

72. JUDGMENT — Stockholder.—A decree rendered in Virginia, in an action against an insolvent corporation and its trustee, ascertaining the debts of the corporation, and making a call on stockholders for a portion of their unpaid subscriptions to pay such debts, is binding in this State on the stockholders, though they were not parties to the action in which the judgment was rendered.—CALLOWAY v. GLENN, Ky., 49 S. W. Rep. 440.

73. LIFE INSURANCE—Default in Payment of Premium Note.—Where the insured, in a policy of life insurance which provides that it should be void if any annual premium should not be paid when due, executed several notes for an annual premium, upon the express agreement that, if default be made in the payment of any of the notes, the policy should then cease, and the agent, upon the maturity of the first note, extended the time of payment to a date fixed, saying that, if insured would pay it before that date, "it would be all right," the policy lapsed upon the failure to pay the note at the time fixed, without further notice to insured.—MANHATTAN LIFE INS. CO. v. PENTECOST, Ky., 49 S. W. Rep. 425.

74. LIFE INSURANCE — Forfeiture for Non-payment of Premiums.—Life policies were, in terms, to be forfeited by failure to pay premiums on the very day they should fall due. Pursuant to directions, the agents, in their monthly reports, marked as canceled those delinquents whose premiums they deemed uncollectible, while the other delinquents were marked simply as in arrears. If these latter paid their premiums before the next monthly report, and produced a health certificate, they were reinstated. Held, that there was no waiver of the forfeiture, where a delinquent who was transferred to the arrearage sheet died before the next monthly report, without having produced a health certificate and paid the premium.—BLAKE v. NAT. LIFE INS. CO., Cal., 56 Pac. Rep. 101.

75. LIFE INSURANCE — Waiver of Defense to Policy.—In an action on a life insurance policy, although a good defense is shown, where it appears that the defendant received information during the lifetime of the insured from which it knew, or should have known, of the existence of such defense, and afterwards called on the insured for a premium, which was paid, the question of whether defendant thereby waived such defense requires the submission of the case to the jury.—LIFE INS. CLEARING CO. v. BULLOCK, U. S. C. C. of App., Fifth Circuit, 91 Fed. Rep. 487.

76. MALICIOUS PROSECUTION—Action.—An action for malicious prosecution cannot be maintained until the prosecution complained of has been legally terminated in favor of defendant therein.—STARK v. BINDLEY, Ind., 52 N. E. Rep. 804.

77. MALICIOUS PROSECUTION—Probable Cause.—Probable cause is, primarily, a question of law for the court; and, where there is no substantial dispute as to its existence or the facts claimed to prove probable cause, the issue cannot properly be submitted to a jury.—TURNEY v. TAYLOR, Kan., 56 Pac. Rep. 137.

78. MARRIED WOMAN — Capacity to Contract.—Act April 28, 1873, authorizing a married woman to contract with reference to her services, her separate estate, or separate business, does not give her power to contract generally. Hence a complaint against a *feme covert* on a note, failing to state facts showing that the contract was such as she was authorized to make is insufficient to support a judgment against her.—WARNER v. HESS, Ark., 49 S. W. Rep. 489.

79. MARRIED WOMEN—Deeds.—Where a wife in good faith acknowledges a deed as her free act, and the officer so certifies in good faith, she cannot, as against a *bona fide* grantee, assert that she was unlawfully forced by her husband to execute the deed.—SPRINGFIELD ENGINE & THRESHER CO. v. DONOVAN, Mo., 49 S. W. Rep. 500.

80. MASTER AND SERVANT — Fellow-servants — Vice-principal.—A conductor of a train is but a fellow-servant of the fireman, and not a vice-principal of the company; so that it is not liable for an injury to the fireman caused by neglect of the conductor to have the brakes set in time to stop the train at a station, and prevent collision with a train he was ordered to meet there; he having no right to employ or discharge the engineer or fireman, and only having such power as others had to report any dereliction of duty, and the rules, while providing that a train shall be run under the direction of its conductor, excepting the case where his directions conflict with the rules and involve risk or hazard, in which case it is provided that the engineer will be held equally responsible.—MEYER v. ILLINOIS CENT. R. CO., Ill., 52 N. E. Rep. 848.

81. MASTER AND SERVANT — Negligence—Assumption of Risks.—Where a brakeman assumes the risks of all ordinary sudden movements of a train on which he is employed, he does not assume any risk of sudden unnecessary movements, though only of ordinary violence, caused by the negligence of the engineer, or by reason of defects in appliances for controlling the movements of the train, not discovered and remedied by the negligence of his employer.—HIGHLAND AVE. & B. R. CO. v. MILLER, Ala., 24 South. Rep. 955.

82. MASTER AND SERVANT — Negligence — Presumptions.—Where a servant of a railroad company, standing from three to six feet from the track, was struck by something and injured as a train passed, the cause of the injury is conjectural, and there is no presumption of negligence on the part of the company.—OWEN v. ILLINOIS CENT. R. CO., Miss., 24 South. Rep. 899.

83. MASTER AND SERVANT—Negligence—Printed Rules.—A master is not compelled to furnish employees with printed rules for their government, guidance, and safety, when the nature of an employment makes it dangerous, and the dangers incident thereto and growing out of it are of common knowledge, are fully known to and understood by the servant, and the safety of others cannot be imperiled by any act of omission of his in the performance of his duties, and his safety depends wholly upon the degree of skill, care, and caution used by himself.—FRITZ v. SALT LAKE & O. GAS & ELEC. LIGHT CO., Utah, 56 Pac. Rep. 90.

84. MECHANIC'S LIEN — Contractor's Bond—Rights of Sureties.—When a contractor has given bond to the owner of the building he has contracted to erect, and one of the conditions of the bond is that the building shall be turned over to the owner with all lien claims "fully discharged, legally waived, or good and sufficient indemnity therefor" furnished to the owner, a surety upon the contractor's bond cannot himself maintain a bill in equity to enforce a lien against the building.—MOYES v. KIMBALL, Me., 42 Atl. Rep. 400.

85. MINING LEASE — Construction—Rental.—In an action to recover one year's rental underja coal-mining-lease, which contained an agreement by the lessees to operate the mine continuously, to pay as royalty a fixed price per bushel for all "lump" and "mine-run" coal taken from the mine, and that the annual out-put of the mine should be 500 cars of 500 bushels each of royalty coal, the defendants, who had mined only a small part of the amount so undertaken to be mined, offered no evidence in mitigation of damages, laid by the plaintiff at the total royalty which would have been due upon the minimum amount agreed to be mined. Held, that the lease furnished the agreed minimum measure of plaintiff's right of recovery for one year's use and control of the mine by the defendant.—SWAN v. BROWN, Kan., 56 Pac. Rep. 141.

86. MINING RIGHTS — Injunction.—It was an abuse of discretion to grant a temporary injunction in a mining suit, where defendant was working veins within its own ground, and there was a mere chance that their apexes were within plaintiff's ground.—MONTANA ORE-PURCHASING CO. v. BOSTON & M. CONSOL. COPPER & SILVER MIN. CO., Mont., 56 Pac. Rep. 120.

87. MORTGAGES—Foreclosure—Title of Purchaser.—A purchaser at a foreclosure sale takes the mortgagee's interest unaffected by notice of infirmities in the mortgagor's title.—SHERIDAN v. SCHIMPF, Ala., 24 South. Rep. 940.

88. MORTGAGES—Possession — Demand — Waiver.—Where, in an action by a mortgagee for the possession of the mortgaged chattels, the mortgagor denies the mortgagee's right of possession, and sets up a verbal agreement that he was to retain possession, the necessity of demand before suit brought is obviated, since a demand would have been futile.—MOORE v. HURTT, N. Car., 32 S. E. Rep. 317.

89. MORTGAGE—Validity.—A mortgage given by a corporation to secure a loan made at the time to the corporation is valid, as against existing creditors, though accompanied by an agreement that its execution should be concealed, and that it should not be recorded within the time prescribed by law.—AMERICAN TRUST & SAVINGS BANK OF CHICAGO v. MCGETTIGAN, Ind., 52 N. E. Rep. 793.

90. MUNICIPAL CORPORATIONS—Current Indebtedness.—Const. 1870, art. 9, § 12, provides that no municipal corporation shall become indebted for any purpose above a certain amount, and that any such corporation, incurring any indebtedness as aforesaid, must provide for the collection of a tax to pay the interest and the debt. Held not to apply to current indebtedness or obligation of a town the payment of which had not been deferred to some fixed period, and was not bearing interest.—TOWN OF KANKAKEE v. MCGREW, Ill., 52 N. E. Rep. 893.

91. MUNICIPAL CORPORATIONS—Grant of Franchise.—Under Const. § 164, providing that no city shall be authorized "to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years," a contract granting a franchise for 20 years from a future date is void.—CITY OF SOMERSET v. SMITH, Ky., 49 S. W. Rep. 456.

92. MUNICIPAL CORPORATIONS — Ordinances.—Under Rev. St. p. 219, § 3, providing that a city may permit the construction of a street railway upon such conditions as it deems best for the public interest, a city may require a street railway to pay an annual tax on each mile of its track as a condition to its right to construct and operate its line.—CHICAGO GEN. RY. CO. v. CITY OF CHICAGO, Ill., 52 N. E. Rep. 880.

93. MUNICIPAL IMPROVEMENT — Ordinance.—A local improvement ordinance, providing that the assessment shall be divided into a stated number of installments, the first to include a certain portion and all fractional amounts, and the remainder to be in equal amounts and multiples of 100, is not void as failing to specify the amount of the installments.—DANFORTH v. VILLAGE OF HINSDALE, Ill., 52 N. E. Rep. 877.

94. NATIONAL BANKS — Suits by Receiver against Shareholders.—The real owner of shares of stock in a national bank, which, by his procurement or permission, stand on the books of the bank in the name of an agent, and have never been in his own name, may be charged as a shareholder for an assessment made on the bank's insolvency, and the receiver may bring an action at law for the collection of such assessment directly against him, without regard to the liability of the agent.—HOUGHTON v. HUBBELL, U. S. C. C. of App., First Circuit, 91 Fed. Rep. 453.

95. NEGLIGENCE—Contributory Negligence—Question for Jury.—Where plaintiff's testimony tends to show freedom from contributory negligence, it is error to take the question from the jury, though there is evidence from which it might be inferred that he was not free from such negligence.—RYAN v. ARDIS, Penn., 42 Atl. Rep. 372.

96. NEGLIGENCE—Natural Gas—Degree of Care.—A person or corporation engaged in furnishing natural gas to stoves, heaters, pipes, etc., for purposes of domestic light, heat, and fuel in a dwelling house, is bound to exercise such care, skill, and diligence in all its operations as is called for by the delicacy, difficulty, and dangerousness of the nature of the business, that injury to others may not be caused thereby; that is to say, if the delicacy, difficulty, and danger are extraordinarily great, extraordinary skill and diligence is required.—BARRICKMAN v. MARION OIL CO., W. Va., 32 S. E. Rep. 327.

97. OFFICE AND OFFICERS—Removal of Examiners.—As the statute which authorizes the county school superintendent to appoint examiners prescribes no definite term of office for such appointees, they may be removed by the county superintendent without notice or assignment of any cause.—JOHNSON v. GINN, Ky., 49 S. W. Rep. 470.

98. PARTIES—Effect of Intervention.—An intervener in an equity suit by leave of court becomes and remains a party for all purposes of the suit, the same as though originally made one.—RICE v. DURHAM WATER CO., U. S. C. C., E. D. (N. Car.), 91 Fed. Rep. 433.

99. PARTNERSHIP—Compensation of Partners.—In the absence of a specific agreement therefor, a partner is not entitled to compensation for his services.—DELP v. EDLIS, Penn., 42 Atl. Rep. 462.

100. PARTNERSHIP—Conversion of Land into Personalty.—The mere purchase of land with partnership money, and its use for carrying on the business of farming, does not furnish evidence of intention on the part of the partners to convert the land into personalty, so as to deprive the widow of a partner of dower therein.—OLIVER'S ASSIGNEE v. OLIVER, Ky., 49 S. W. Rep. 473.

101. PARTNERSHIP—Notice.—A partner is not liable for the price of goods sold to his co-partner over his protest, and after notice that he would not be bound therefor.—DAWSON BLAKEMORE & CO. v. ELROD, Ky., 49 S. W. Rep. 465.

102. PATENTS—Payment of Royalties.—Where a person manufactured an article under a patented process, and apparently under the patent, and paid royalties to the patentee, he cannot be heard to say he was not a licensee, but a mere infringer.—ILLINOIS WATCH CASE CO. v. ECAUBERT, Ill., 52 N. E. Rep. 861.

103. PRINCIPAL AND AGENT—Contract—Knowledge of Principal.—Knowledge by the principal of the terms and conditions of an unauthorized contract entered into by an agent is not to be presumed from the fact that the principal had a reasonable opportunity to have acquired such knowledge.—SEHRT-PATTERSON MILLING CO. v. HUGHES, Kan., 56 Pac. Rep. 143.

104. PRINCIPAL AND AGENT—Ratification.—A principal does not ratify an unauthorized transaction of his agent by retaining benefits after discovery thereof, where it is beyond his power to reject them.—SWAYNE v. UNION MUT. LIFE INS. CO., Tex., 49 S. W. Rep. 518.

105. PROCESS — False Return — Amendment.—Even after suit has been commenced against a sheriff for false return as to the manner and date of service of a summons, the trial court may, in its discretion, allow the sheriff to amend the return so as to conform to the facts, where the error arose from ignorance of the law, and no injury resulted therefrom.—SWAIN v. BURDEN, N. Car., 32 S. E. Rep. 319.

106. RAILROAD COMPANY—Injury to Abutting Property.—Where an abutting property owner suing for damages resulting both from the construction and prudent operation of a railroad was compelled to elect which cause of action he would prosecute, and elected to sue for damages, resulting from the construction of the road, a judgment in his favor is a bar to a subsequent recovery of damages, either against the original defendant which constructed the road, or against its licensees operating the road, for injury resulting from the prudent operation of the road, in the absence of facts estopping the defendants from pleading such judgment as a bar.—COVINGTON & C. ELEVATED RAILROAD TRANSFER & BRIDGE CO. v. KLEIMEIER, Ky., 49 S. W. Rep. 484.

107. RAILROAD COMPANY—Sleeping Car Companies—Negligence.—A sleeping car company is liable for negligently permitting thieves to steal a passenger's property while he was sleeping, though he did not notify the company that he had the property.—PULLMAN PALACE CAR CO. v. ADAMS, Ala., 24 South. Rep. 921.

108. RAILROAD COMPANY — Street Railroads—Injuries to Trespassers.—Where a boy, being unable to get on an open electric car, stands upon the side of the car, on which strips extend to prevent the egress or ingress of passengers, placing his foot on the boxing of the axle, and rides thereon for some distance without paying a fare or offering to do so, and without being asked for his fare, he not being seen by any employee of the railroad company, though he had money in his pocket with which to pay such fare, if asked for it, and falls off and is run over by the wheels of the trailer, the railroad company is not liable for injuries received, the place where the boy was riding being very dangerous.—UDELL v. CITIZENS' ST. R. CO., Ind., 52 N. E. Rep. 799.

109. RECEIVERS—Order—Finality.—An order of court passing on a receiver's account, and commanding him to hold the balance found due from him subject to order of the court, is final as to the receiver, unless he appeals therefrom; and hence he cannot afterwards reassert the propriety of disbursements passed on by the order.—STEVENS v. HADFIELD, Ill., 52 N. E. Rep. 875.

110. RELIGIOUS SOCIETIES—Mortgage.—Where a mortgage on church property is executed by the trustees at the direction of the congregation, as provided by the general incorporation act relative to religious corporations (section 43), it is immaterial what faction members of the congregation voting therefor belonged to; the mortgagee having no notice of differences in theological views among the members.—ZION CHURCH OF STERLING v. MENSCH, Ill., 52 N. E. Rep. 828.

111. RELIGIOUS SOCIETIES — Rights in Real Estate.—Purple's St. 1856, ch. 25, div. 3, §§ 44, 46, provide that associations created for purposes of religious worship may hold a certain amount of real estate, on which they may build houses necessary "for the purposes aforesaid," and that all lands possessed by such corporations shall be held for the purposes named, and no other. Held, that such an association cannot devote its lands and buildings to secular uses.—FIRST M. E. CHURCH OF CHICAGO v. DIXON, Ill., 52 N. E. Rep. 887.

112. SCHOOLS — Compulsory Vaccination of Pupils.—In the absence of smallpox in the community, or cause to apprehend its appearance, vaccination of a pupil cannot be compelled as a condition precedent to permitting him to attend a public school.—PEOPLE v. BOARD OF EDUCATION OF DIST. NO. 2, Ill., 52 N. E. Rep. 850.

113. STATES—Suit against Agents of State.—The Kentucky Board of Managers of the World's Columbian Exposition, created by Act Jan. 19, 1893, with power to make contracts, may be sued as if it were a corporation, though not named as such, the rule exempting the State and its officers from suit having no application.—GROSS v. KENTUCKY BOARD OF MANAGERS OF WORLD'S COLUMBIAN EXPOSITION, Ky., 49 S. W. Rep. 458.

114. TRUST DEED—Rights of Beneficiaries.—A deed of lands to a husband and wife in trust for their children, free from the debts of the parents, or their control, other than the use and appropriation of the income for their sustenance and the education and maintenance of the children, places no restraint on the right of the children to alienate their interest during the lifetime of either of the parents.—HONNETT v. WILLIAMS, Ark., 49 S. W. Rep. 495.

115. VENDORS' LIENS — Enforcement — Pleading.—A bill to declare and enforce a vendor's lien, by the indorsee of purchase-money notes, alleging that defendant executed such notes for the purchase of the land, is demurrable, where it nowhere appears that defendant himself was the purchaser, or that the title is or ever was devested from the vendor and vested in defendant, and where there is no averment from which it can be inferred where the title resides.—CLEMENTS v. MOTLEY, Ala., 24 South. Rep. 947.

116. VENDOR AND PURCHASER—Contract.—*Prima facie*, a contract to buy land was not completed where complainants, before notification of acceptance, withdrew an offer to buy from defendant, which they had embodied in a writing and left with his employees.—GROSS v. ARNOLD, Ill., 52 N. E. Rep. 867.

117. VENDOR AND PURCHASER—Purchase-money Note.—A purchaser-money note expressly retaining a vendor's lien was renewed, with stipulation for attorney's fees, not in the original note, after the property had become the homestead of the purchaser. Held not to create a lien for the attorney's fees.—BULLARD v. MAYNE, Tex., 49 S. W. Rep. 522.

118. WILLS—Bequest—Limitation by Condition.—Testatrix provided in her will that her two sons should "share alike," and that "if neither of my sons have children, the principal will come back to" the children of a certain daughter. Both sons were childless at the date of the will. Subsequently, a child was born to one of them, which survived the testatrix, but the other remained without children. Held, that testatrix intended to attach a condition to the share bequeathed to each of her sons, respectively, which was fulfilled as to the one to whom the child was born, but remained unfulfilled as to the other, whose bequest can become absolute only on the birth of a child to him.—IN RE KENNEDY'S ESTATE, Penn., 42 Atl. Rep. 459.

119. WILLS — Devise in Fee.—Testator's wife takes in fee, and not for life only, the will providing: "All of the property of which I may die seised or possessed I give unto my beloved wife, to have, use, lease, dispose of, and convey at her own will and discretion, subject only to this restriction and prohibition: that she shall not mortgage or convey the same without the written consent of H and M during their joint lives, or of the survivor of them during his life."—MUHLKE v. TIEDEMANN, Ill., 52 N. E. Rep. 843.

120. WITNESS—Husband and Wife.—A witness appearing against accused testified that she had married him, but afterwards found a written admission of his that he had a wife living, which, being shown to him, he verbally admitted to be true. A witness who had known accused many years testified that he knew the wife, and learned from her neighbors that she was still alive. Accused testified, but did not deny having a wife living at his marriage with the witness. Held, that the fact of the former wife living was sufficiently shown, so as to render the second woman competent to testify against accused.—CLARK v. PEOPLE, Ill., 52 N. E. Rep. 857.